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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, the Attorney General of the State of New Jersey,

Petitioners,

vs.

RUBIN CARTER and JOHN ARTIS,

Respondents.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey, and IRWIN I. KIMMELMAN, the Attorney General of the State of New Jersey,

Petitioners,

vs.

JOHN ARTIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN P. GOCELJAK
Counsel of Record
Special Deputy Attorney General-In-Charge
Acting Passaic County Prosecutor
Office of the Passaic County Prosecutor
New Court House
77 Hamilton Street
Paterson, New Jersey 07505
(201) 881-4896

RONALD G. MARMO
Special Deputy Attorney General
Acting Chief Assistant Prosecutor

GARY H. SCHLYEN
Special Deputy Attorney General
Acting Senior Assistant Prosecutor

Of Counsel & On the Petition

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

255 pp

QUESTIONS PRESENTED

1. Whether state court findings of the lack of materiality of undisclosed evidence constitute findings of fact under 28 *U.S.C.* §2254(d) and are thus entitled to the presumption of correctness in a federal habeas corpus proceeding.

2. Whether undisclosed evidence of essentially a cumulative, impeaching nature and likely to elicit additional evidence supportive of guilt if utilized possesses the materiality requisite for a finding of a due process violation under the case law of *Brady v. Maryland* and its progeny.

3. Whether a notice of appeal is sufficiently defective to warrant, on entry of judgment of the Court of Appeals, dismissal of an appeal to said court for failure of the notice to have recited the name of one of the two habeas petitioners whose grant of relief was intended to be encompassed within the notice of appeal.

PARTIES BELOW

All parties below are parties to this petition.

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-vs-

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-vs-

JOHN ARTIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, John J. Rafferty, Superintendent, Rahway State Prison, Christopher Dietz, Chairman, Parole Board of the State of New Jersey, and Irwin I. Kimmelman, Attorney General of the State of New Jersey, respectfully pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceedings on August 21, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 826 *F.*2d 1299, and is reproduced in Appendix A hereto.

The opinion of the United States District Court for the District of New Jersey is reported at 621 *F.Supp.* 533, and is reproduced in Appendix B.

The opinion of the New Jersey Supreme Court is reported at 91 *N.J.* 86, 449 *A.*2d 1280, and is reproduced in Appendix C.

The opinion on remand of the New Jersey Superior Court, Law Division, is not officially reported and is reproduced at Appendix D.

JURISDICTION

Invoking federal jurisdiction under 28 *U.S.C.* §2254, respondents petitioned for writs of habeas corpus in the United States District Court for the District of New Jersey on February 13 and 28, 1985. On November 7, 1985, opinion amended November 13, 1985, the District Court granted respondents' motion for summary judgment.

Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit under 28 *U.S.C.* §2253. By opinion entered on August 21, 1987, the Third Circuit affirmed the judgment of the District Court with respect to Carter and dismissed the appeal challenging the District Court's judgment with respect to Artis.

The jurisdiction of the Court to review the judgment of the Third Circuit is invoked under 28 *U.S.C.* §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 *U.S.C.* §2254(d)

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

At approximately 2:30 a.m. on June 17, 1966 two armed men entered the Lafayette Bar and Grill in Paterson, New Jersey and opened fire. Bartender James Oliver was killed instantly by a shotgun blast to the back and patron Fred Nauyaks was also immediately killed, having been shot in the head at close range by a handgun. A female patron, Hazel Tanis, sustained both a shotgun blast to the arm and multiple handgun bullet wounds to the body; having sustained injuries to her lung, spine and rectum, Tanis died four weeks later. A fourth patron, William Marins, was shot with a handgun, a bullet entering his left temple and exiting the right forehead, destroying the optic nerve. He survived the carnage, dying approximately a year later.

Respondents Rubin Carter and John Artis were subsequently each charged with three counts of first degree murder in the slayings of Oliver, Nauyaks and Tanis, and were convicted after a jury trial in 1967. The judgments of conviction were affirmed by the Supreme Court of New Jersey, *State v. Carter,* 54 *N.J.* 436, 255 *A.*2d 746 (1969), *cert.* den., 397 *U.S.* 948, 90 *S.Ct.* 969, 25 *L.Ed.*2d 130 (1970). After unsuccessful motions for a new trial were pursued to the State Supreme Court, that Court overturned the convictions and directed a new trial, grounded on failure of pretrial disclosure to the defense of information relative to protection and assistance to State identification witnesses. *State v. Carter,* 69 *N.J.* 420, 354 *A.*2d 627 (1976).

The second trial commenced on October 12, 1976 and concluded on December 22, 1976 with a jury verdict again finding Respondents Carter and Artis guilty of the multiple first degree murder counts. Put before the jury was testimony from eyewitnesses to the effect that the Carter vehicle, as well as Carter and Artis, were at and fled the scene. Also put before the jury was testimony relative to: the recovery of a shotgun shell and a .32 caliber bullet, consistent with the weapons used in the slayings, from the Carter vehicle which had been seized the night of the shooting; movements of Respondents prior to and shortly after the murders, consistent with their involvement; a search for weapons by Carter hours before the shootings; inconsistent statements of Respondents regarding their actions prior to, concurrent with, and following the murders; admission by 1967 trial alibi witnesses for Carter that the alibis so previously testified to had been fabricated; and establishment of a motive for the shotgun murder of the Lafayette Bar and Grill bartender, and of the patrons as witnesses thereto, arising from the shotgun slaying six hours earlier of tavern owner Leroy Holloway, whose step son was a friend of Carter and Artis.

On the night of the shootings, defendant Carter, in the company of Artis, had been observed by police officers, and indeed once momentarily stopped within 6 minutes of

the initial police alarm, while in Carter's new 1966 Dodge which bore New York State license plates. Mrs. Patricia Valentine, who lived above the tavern, had been awakened by the shots and, on running to her window, observed two black men run to an automobile and flee the scene. The vehicle was a white car, with distinctive truncated triangular taillights, and out-of-state plates. When the vehicle containing Carter and Artis was subsequently brought back to the Lafayette Bar scene, some twenty minutes after the observations by Mrs. Valentine, she identified it as the one she had seen earlier.

Another witness, who was the subject of State polygraph testing before the 1976 trial, was one Alfred Bello. The affirmance of the grant of habeas relief by the Third Circuit, the subject of the instant petition, is premised upon the Court's acceptance that the polygrapher's initial oral statements to the authorities regarding the results of the testing, not disclosed to the defense, constituted material evidence so as to justify a finding of due process violation under *Brady v. Maryland,* 373 *U.S.* 83, 83 *S.Ct.* 1194, 10 *L.Ed.*2d 215 (1963) and its progeny.

In testimony given at the 1976 trial, and consistent with his testimony at the original 1967 trial, Bello related he and a companion, Arthur Dexter Bradley, were engaging in a burglary near the Lafayette Bar the night of the shooting. While outside, acting as a lookout, Bello walked to the Lafayette Bar to get cigarettes. He heard shots and saw two black men, one with a shotgun and the other with a handgun, come around the corner. Bello hid, heard the sound of a fleeing car, and saw a white vehicle, with triangular shaped tail lights, and New York or Pennsylvania plates flee the scene. Bello was to advise the police, four months later, that the men he had seen were Carter and Artis, and so testified at the 1967 and 1976 trials.

In the period between the trials, Bello had recanted his identifications of Carter and Artis, which included assertion in a 1974 statement he could not positively identify the respondents, and in 1975, claiming that he was in the

bar during the shootings and witnessed the slayings by two black men *not* Carter and Artis, but did see respondents outside after he fled from the tavern. Determined to evaluate, prior to the 1976 trial, the credibility of Bello's original 1967 testimony, the County Prosecutor arranged for polygraph testing of Bello by two eminent independent polygraphists, Richard Arther and Leonard Harrelson. Professor Harrelson, declining invitation to review Bello's 1967 testimony, had conducted a pre-test interview with Bello and the polygraph testing. In the course of examination, Bello advised Harrelson the repudiation of his 1967 testimony had itself been untrue, the result of pressure and manipulation by persons favorable to the defense. As was confirmed at subsequent hearings before the trial court, Harrelson believed Bello was truthful in stating he was in the bar prior to and during the shootings, but also believed Bello when he related he saw Carter and Artis coming outside the bar, armed, and that no other persons were involved in the shootings. Harrelson was convinced, from the examination of Bello, and as he related to polygraphist Arther and at the hearing, that Carter and Artis were "the perpetrators of the annihilations", that he had "no doubt at all" Carter and Artis were the murderers. Harrelson had orally advised Prosecutor's Office personnel, before submission of a written report, that Bello had been in the bar at the time of the shooting; this was the content of the undisclosed evidence upon which the grant of habeas corpus relief was upheld by the Third Circuit. In his later written report, Harrelson concluded (again without review of the prior 1967 trial testimony wherein Bello related not having been in the bar during the shooting) that Bello's testimony had been true.

The New Jersey Supreme Court had directed the original 1976 trial judge to conduct a hearing and to "make findings of fact regarding the prosecutor's knowledge of the ambiguity in Harrelson's report", to "make findings of fact bearing on" what use the prosecution made of Harrelson's report in confronting Bello prior to the second trial and to determine if a *Brady* violation had occurred.

State v. Carter, 85 *N.J.* 300, 315-316, 426 *A.*2d 501, 508-509 (1981). The hearing was conducted from May 18 to June 8, 1981, resulting in issuance of an 80 page opinion on the remand (Appendix D). The court found that while the Harrelson oral statements were known to the State and not disclosed to the defense, there was justification for the nondisclosure under the circumstances (Appendix D at 175a; 179a-182a). The Court, more to the point, found as fact that Bello had repudiated his recantation of the 1967 testimony during the test interview with Harrelson, that the prosecutor had not caused Bello to so recant the recantation by coercion or deceit, and the State did not misrepresent to Bello the results of the polygraph testimony to get Bello to return to the "on the street" version related to his 1967 testimony (Appendix D at 176a). Addressing the question of materiality of the undisclosed Harrelson oral statements, the state trial court found the evidence would have only constituted cumulative impeaching evidence as to Bello's credibility, already the subject of searching cross examination, including questioning as to his previous narrations at the trial in 1976, and that disclosure of the withheld evidence, rather than being favorable to the defense, "would have been devastating to the defense" in causing elicitation of Harrelson's confirmation of Bello's truthfulness in identifying Carter and Artis as the only two persons involved in and who committed the murders (Appendix D at 167a; 177a; 185a-187a). The trial judge concluded the nondisclosure of the Harrelson oral report "in no way would or could have affected the outcome of the second Carter-Artis trial." (Appendix D at 189a).

The New Jersey Supreme Court majority *State v. Carter,* 91 *N.J.* 86, 449 *A.*2d 1280 (1982) (Appendix C) accepted the remand findings of the state trial judge. It was noted that (1) disclosure of the Harrelson oral statement would have prompted elicitation of the polygraph examination test results, thus putting before the jury "that an eminent polygrapher entertained 'no doubt at all' that Bello was truthful when he identified the defendants as the mur-

derers", (2) that those test results were *not* supportive of the prior Bello narratives advising he witnessed the shootings by persons other than Carter and Artis, (3) that with Bello having been subjected to "exhaustive attack during the trial", "there is no reasonable likelihood that further impeaching evidence would have affected the outcome of the trial", and (4) that such an impact was even more unlikely "in view of the wealth of other evidence amassed against the defendants", noting Bello's identification of Carter and Artis outside the bar "did not stand alone" in view of Mrs. Valentine's testimony and the accumulation of the other evidence of guilt related above (Appendix C at 96a to 109a). The State Supreme Court, also rejecting *inter alia* the claim that the State's use of the motive evidence was too prejudicial due to the racial aspect, thus affirmed Respondents' convictions (Appendix C at 88a to 96a).

Over eight years after the return of the second trial verdicts and over two years after the State Supreme Court rejection of the above claims, Respondents, in February, 1985, filed petitions for writ of habeas corpus, later consolidated, with the United States District Court for the District of New Jersey, raising the *Brady* and impermissible motive claims anew. The District Court accepted both contentions of due process violation, and by opinion of November 7, 1985(as amended November 13, 1985) granted the writ. *Carter v. Rafferty,* 621 *F.Supp.* 533 (D.N.J. 1985) (Appendix B). Petitioners pursued appeal to the United States Court of Appeals for the Third Circuit. That Court, resting its decision on the *Brady* violation claim, affirmed the grant of the writ. *Carter v. Rafferty,* 826 *F.*2d 1299 (3rd Cir. 1987) (Appendix A) The Third Circuit, following the lead of the District Court, likewise declared that the question of materiality of the undisclosed Harrelson oral report was not a factual issue to which the determination of the State courts would otherwise be entitled to a presumption of correctness under 28 *U.S.C.* §2254(d). The Court acknowledged that the designation of materiality under the habeas corpus statute, in the *Brady* violation

context, had not been yet ruled upon by the Third Circuit nor by the United States Supreme Court; the Court held materiality to be a mixed question of law and fact so as to dispense with federal court deference to the findings of the State courts that the oral polygraph reports were cumulative and immaterial. 826 *F.*2d at 1305-1306; Appendix A at 13a to 15a. The Third Circuit, accepting the claims of the utility of the evidence for the defense that were rejected by the State trial judge and Supreme Court, declared the introduction of the Harrelson oral reports had more than cumulative impeachment value. Further citing to the District Court's substantial adoption of the defense's characterization of the weight of the inculpatory evidence at trial as a whole, the Third Circuit declared the Bello testimony to have been critical to the State's case to the end that, again in derogation of the State Court findings, disclosure of the Harrelson oral statements possessed a reasonable probability to have brought about a different result at trial. Finding thus no error in the District Court's conclusion the reports were "material" under *Brady,* the grant of habeas relief was upheld. 826 *F.*2d at 1306-1309; Appendix A at 15a to 21a. The Court also dismissed the appeal from the grant of relief to Artis on the ground the Notice of Appeal was deficient. 826 *F.*2d at 1303-1304; Appendix A at 9a-10a.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S HOLDING THAT THE DETERMINATION OF MATERIALITY OF UNDISCLOSED EVIDENCE IS NOT A FACTUAL ISSUE ENTITLED TO THE PRESUMPTION OF CORRECTNESS MANDATED BY 28 U.S.C. §2254(d) IS ERRONEOUS. SUCH RAISES AN IMPORTANT ISSUE, NOT RESOLVED BY THIS COURT, WHICH IS CRUCIAL TO THE PROPER HANDLING AND DISPOSITION OF HABEAS CORPUS PROCEEDINGS.

Over twenty years after the commission of three brutally executed homicides, over ten years after the second return

of a jury verdict finding respondents guilty in the commission of those murders, and after affirmance following interminable review of the record and findings of fact and law by the New Jersey state trial, appellate level and Supreme Court judges and justices, the setting aside of those convictions through the summary judgment grant of habeas corpus relief by the District Court of New Jersey has been upheld by the Third Circuit Court of Appeals. Central to the District Court's grant of the writ, which led to findings contrary to those reached by the state trial and Supreme Court, was the abrogation of the presumption of correctness, under 28 U.S.C. §2254(d), with regard to the state court findings of lack of materiality of the undisclosed Harrelson oral statements. The Third Circuit herein, without the benefit of a prior ruling on the issue by that Court and recognizing that the question has not been precisely decided by this Court, has nonetheless held that a state court finding regarding materiality of undisclosed evidence, pertinent to a determination of a violation of due process under *Brady v. Maryland*, 373 *U.S.* 83, 83 *S.Ct.* 1194, 10 *L.Ed.*2d 215 (1963) and its progeny, is not a finding of a factual issue, and therefore not to be accorded the presumption of correctness mandated by 28 U.S.C. §2254(d). Petitioners submit that ruling is erroneous, being contrary to the congressional intent and the principles set forth in the most recent decisions of this Court on the scope of §2254(d), and commands review by this Court in view of the grave implications of the ruling to the proper exercise of habeas review authority by the Federal Courts.

Section 2254(d) provides that in a habeas corpus proceeding instituted by a person in State custody "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct" unless the petitioner establishes or it is otherwise shown or conceded that one of several enumerated bases for exception exists, including "(8). . .[wherein] the

Federal Court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record." In the absence of establishment of one of the exceptions "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous."

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 *U.S.* at 87, 83 *S.Ct.* at 1186, 10 *L.Ed.*2d at 218. As subsequently set forth in *United States v. Agurs*, 427 *U.S.* 97, 104, 96 *S.Ct.* 2392, 49 *L.Ed.*2d 342 (1976), a due process violation is effected when the requested and unrevealed evidence "might have affected the outcome of the trial." More recently, in *United States v. Bagley*, 473 *U.S.* 667, 682, 105 *S.Ct.* 3375, 3384, 87 *L.Ed.*2d 481, 494 (1985) the Court iterated that:

> The evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the results of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

While critical to resolution of the ultimate constitutional question, we submit the determination of materiality of the undisclosed evidence, so dependent upon an intimate knowledge of the weight of the proofs, credibility of the witnesses and potential impact of the evidence upon the jurors' assessment of the totality of evidence, must be recognized to be a question of fact. The finding of the state courts, particularly of the trial judge, should be given the great deference intended by Congress in its enactment of §2254(d).

The importance of the resolution of the question of whether §2254(d) encompasses materiality as a fact issue cannot be underestimated; it impacts upon the extent of the federal

judiciary's intervention in concluded state criminal processes, as well as its practical ability to carry out "the limited nature of the review provided federal courts by 28 U.S.C. §2254 [28 U.S.C.S. §2254]." *Sumner v. Mata* (*Sumner I*), 449 *U.S.* 539, 541, 101 *S.Ct.* 764, 766, 66 *L.Ed.*2d 722, 727 (1981). The Court in *Sumner I* was confronted with apparent failure of the Federal Court of Appeals to pay heed to the presumption of correctness mandated by §2254(d). Justice Rehnquist, for the Court, was to note, 449 *U.S.* at 543-544, 101 *S.Ct.* at 767, 66 *L.Ed.*2d at 728-729 that such raised important questions regarding the federal court's habeas corpus authority.

It was the mandate of Congress to impose a presumption of correctness upon the findings of a case which "by that time had run the gamut of a state judicial system", whose judicial officers are as aware of their responsibility to uphold the Constitution as are members of the federal judiciary.*

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* Further recognizing both the propriety and utility of giving deference to fully adjudicated state court findings, see Justice O'Connor's observations in O'Connor, *Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge*, 22 William and Mary L. Rev. 801, 814-815 (1981): "If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independant, and viable. xxx It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court."; note as well the remarks of Judge Friendly of the Second Circuit Court of Appeals, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) at 165, n. 125: "My observation of the work of the excellent state courts of New York, Connecticut and Vermont does not suggest that federal determination of [disputed determinations of fact and application of recognized legal standards] is notably better. In the vast majority of cases we agree with the state courts, after a large expenditure of judges' and lawyers' time. In the few where we disagree, I feel no assurance that the federal determination is superior. When I am confident that the issue has received real attention and the state trial and appellate judges have been in accord among themselves, I see no sufficient reason to elevate my views over theirs in a close case."

In *Maggio v. Fulford*, 462 *U.S.* 111, 103 *S.Ct.* 2261, 76 *L.Ed.*2d 794 (1983), the Court would again deal with the scope of §2254(d), as it pertained to a state court finding of competency to stand trial. While of the view the section did not apply to questions of competency, Justice White, concurring, acknowledged the importance of the issue through his declaration that:

> If there is any doubt as to the proper classification of the competency question, we should grant certiorari and set this case for oral argument [462 *U.S.* at 119, 103 *S.Ct.* at 2265, 76 *L.Ed.* at 801].

Recognizing that this Court has acknowledged that "[i]t will not always be easy to separate questions of 'fact' from 'missed questions of law and fact' for §2254 [d] purposes," *Wainwright v. Witt*, 469 *U.S.* 412, 429, 105 *S.Ct.* 844, 855, 83 *L.Ed.*2d 841, 855 (1985), the Third Circuit declared below that:

> we are safe in suggesting that the Court adheres to the view that the presumption applies only to '"basic, primary or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators. . . ."' *"Cuyler v. Sullivan*, 446 *U.S.* 335, 342 (1980) (citations omitted); see *Wainwright*, 469 *U.S.* at 428 n.8 [826 *F.*2d at 1306; Appendix A at 14a].

We submit the view of the Court, particularly recently, has not been so limited; that the federal habeas courts are not to treat the state courts as mere scriveners of the record, to whose conclusions deference is due only to the extent those findings reflect ministerial recordings of proofs or bare notations of credibility. The Court has accepted that among the determinations deemed a "factual issue" within §2254(d) are the state court findings on a witness's adequacy of observation, nature of description, and presence or absence of pressures from law enforcement agents, factors critical to resolution of the ultimate question of constitutionality of a pretrial identification yet which are nonetheless findings to which the federal courts

must give the "high measure of deference" mandated by §2254(d). *Sumner v. Mata,* (Sumner II), 455 *U.S.* 591 597-598, 102 *S.Ct.* 1303, 1306-1307, 71 *L.Ed.*2d 480, 486-487 (1982). Also deemed within the scope of the presumption of correctness, as a "factual finding", are state court determinations a defendant received and understood sufficient notice of the charge against him, albeit highly pertinent to the overall legal issue of voluntariness of his plea (*Marshall v. Lonberger,* 459 *U.S.* 422, 103 *S.Ct.* 843, 74 *L.Ed.*2d 646 (1983)), that a defendant was competent to stand trial (*Maggio v. Fulford, supra*), that a jury's deliberations were not biased by disclosure of nature of an *ex parte* communication (*Rushen v. Spain,* 464 *U.S.* 114, 120, 104 *S.Ct.* 453, 456, 78 *L.Ed.*2d 267, 274 (1983)), that particular jurors were impartial (*Patton v. Yount,* 467 *U.S.* 1025, 1036-1037, 104 *S.Ct.* 2885, 2891-2892, 81 *L.Ed.*2d 847, 857-858 (1984)), and that a prospective capital sentencing juror was properly excluded for cause (*Wainwright v. Witt,* 469 *U.S.* 412, 427-429, 105 *S.Ct.* 844, 853-855, 83 *L.Ed.*2d 841, 854-855 (1985)).

More recently, in *Miller v. Fenton,* 474 *U.S.* 104, 106 S.Ct. 445, 88 *L.Ed.*2d 405 (1985), Justice O'Connor, writing for the Court, acknowledged that "the Court has not charted an entirely clear course in this area", wherein "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." 474 *U.S.* at 113, 106 *S.Ct.* 451, 88 *L.Ed.*2d at 412-413. It was recognized, nonetheless, that among the "now well established" principles in the area was that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." 474 *U.S.* at 113, 106 *S.Ct.* at 451, 88 *L Ed.*2d at 413. Having further observed that the decision to term an issue one of "fact", "law" or a "mixed question of law and fact" "is sometimes as much a matter of allocation as it is of analysis", the Court declared:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical

> fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.
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> x x x
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> [C]onsiderations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifcations for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. Patton v. Yount, supra, and Wainwright v. Witt, supra, are illustrative. There the Court stressed that the state trial judge is in a position to assess juror bias that is far superior to that of federal judges reviewing an application for a writ of habeas corpus. Principally for that reason, the decisions held, juror bias merits treatment as a "factual issue" within the meaning of §2254(d) notwithstanding the intimate connection between such determinations and the constitutional guarantee of an impartial jury [474 *U.S.* at 114-115, 106 *S.Ct.* at 451-452, 88 *L.Ed.*2d at 413-414].

Petitioners submit the determination of materiality of undisclosed evidence under the *Brady—Bagley* criteria is equally an issue so dependent upon acute awareness and evaluation of witness credibility, as well as the intuitive assessment of the potential impact of the evidence upon the jurors, that it likewise must be accepted that the trial judge is "better positioned . . . to decide the issue." Accordingly, his finding in this area "merits treatment as a 'factual issue' within the meaning of §2254(d) notwithstanding the intimate connection between such determinations and the constitutional guarantee" of due process under *Brady—Bagley.* Having shared with the jury the common experience of observing the lengthy trial herein,

including the demeanor of the witnesses, Bello inclusive, having been charged with, and entrusted by, the State Supreme Court with the duty "to assess the suppressed information in the light of the requirement for finding a *Brady* violation" (*State v. Carter*, 91 *N.J.* at 110, 449 *A.*2d at 1292) and having presided over the extensive remand hearing, the trial judge conclusively found as fact "any further examination [of Bello] would have been cumulative and repetitious" (Opinion on Remand, p. 57, Appendix D at 177a). This unerringly led the court to "find no merit to the defendant's contention that the oral statement of Harrelson, if disclosed, might have affected the trial result", to "find that the prosecutor's nondisclosure of Harrelson's preliminary oral report in no way would or could have affected the outcome of the second Carter-Artis trial." (Opinion on Remand, pp. 73-74; Appendix D at 189a). This finding of immateriality was concurred in by the majority of the State Supreme Court, 91 *N.J.* at 118-119, 121, 449 *A.*2d at 1297.*

To countenance disregard of these state court findings by the expediency of classifying the question of materiality as a mixed issue of fact and law is, we submit, clearly in conflict with the Congressional mandate of §2254(d) and this Court's corresponding resolve to not permit an evolution of the habeas jurisdiction of the Federal Courts into a general appellate review authority over state criminal adjudications and affirmances. We note that the Third Circuit's holding is not one universally shared by the federal judiciary. The Court below relied *inter alia* on the Fifth Circuit holding in *Davis v. Heyd*, 479 *F.*2d 446, 451 (5th Cir. 1973) that neither of the "inextricably intertwined" issues of consistency between trial and undisclosed pretrial statements, and materiality, were encompassed as "factual

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* That Court's notation, 91 *N.J.* at 114, 449 *A.*2d at 1295, that "we must be mindful that we are reviewing the trial court's decision that the nondisclosure... 'in no way would or could have affected the outcome' of the trial," is indicative it was according the trial judge's finding the deference due a "factual issue" determination by one best suited to make that finding.

issues" with the §2254(d) presumption of correctness.* Yet the dissent in *Davis v. Heyd,* recognizing that "the majority decision is likely to have far-reaching future consequences for the federal courts in this Circuit", observed, 479 *F.*2d at 455, that view "puts us right back where we were before §2254(d) was enacted", adding to the "hopeless mound of litigation" burdening the federal courts.

Note also *Mixon v. Attorney General of the State of South Carolina,* 538 *F.Supp* 190 (D.S.C. 1982), categorically accepting that a State Court finding that withheld statements of a co-indictee "would not have affected the result" of the trial was entitled to the presumption of correctness mandated by 28 *U.S.C.* §2254(d).

Petitioners assert that the Third Circuit's holding that the reasoned materiality findings of the state-courts are not factual determinations entitled to the presumption of correctness conflicts with the intent of Congress and the spirit of the decisions of this Court. Based upon these arguments and the importance of the issue, not previously decided by this Court, petitioners request the Court grant a writ of *certiorari* to review the decision of the Court of Appeals for the Third Circuit.

II

THE THIRD CIRCUIT FINDING OF MATERIALITY IS NOT SUPPORTED BY THE RECORD AND CONTRAVENES THE REASONABLE PROBABILITY OF CHANGE IN VERDICT STANDARD ENUNCIATED IN *UNITED STATES V. BAGLEY*

The Third Circuit below recognized, as developed through *Brady v. Maryland, United States v. Agurs,* and *United States v. Bagley,* that before the nondisclosure of impeaching evidence may necessitate setting aside of a

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* *Davis v. Heyd,* in turn, has been relied upon by the Seventh Circuit in *Ruiz v. Cady,* 635 *F.*2d 584, 589 (7th Cir. 1980) and the Tenth Circuit in *Chaney v. Brown,* 730 *F.*2d 1334, 1345-46 (10th Cir. 1984), *cert.* den. 469 *U.S.* 1090, 105 *S.Ct.* 601, 83 *L.Ed.*2d 710 (1984).

conviction and grant of a new trial, the undisclosed evidence must be material in that it creates "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Bagley*, 473 *U.S.* at 682, 105 *S.Ct.* at 3384, 87 *L.Ed.*2d at 494. Assuming *arguendo* the materiality question is not a "factual issue", thus enabling the federal habeas courts to not presume the correctness of the state court findings of lack of requisite materiality, Petitioners submit the finding of materiality reached by the Third Circuit (as also determined by the District Court) was erroneous and the consequence of inadequate evaluation of the record which does not support the finding. The finding is, we submit, in contravention of the standard of materiality established by this Court.

While stating a critical review of the record "necessarily requires the reviewing Court to engage in speculation" the Court of Appeals nevertheless declared its view that "under any reasonable characterization of the 1976 trial, the critical importance of Bello's testimony to the prosecution's case looms large and compelling." (Opinion of the Third Circuit, pp. 21-22; Appendix A at 20a). Its ultimate holding of materiality was premised on its acceptance of the utility of the oral reports to dispositively discredit witness Bello and its declaration of the critical importance of Bello's testimony to the establishment of guilt, suggestive of acquiescence in the District Court's opinion this was a "close" case. Petitioners submit both premises cannot reliably be sustained by the record; as exemplified by the findings of the state trial and Supreme Courts, the undisclosed evidence was of only a cumulative, impeaching nature, whose elicitation at trial would have ultimately inured to the defendants' detriment, and which was further rendered immaterial—incapable of creating a reasonable doubt a verdict of acquittal would have been obtained—due to the mass of other incriminating evidence. The intent of this Court to establish a standard of materiality requiring a reasonable probability of doubt in the reliability of the

verdict is thwarted by the judgment of the Third Circuit, meriting the grant of certiorari.

The Third Circuit accepted the District Court's view, contrary to that of the State trial judge and Supreme Court, that introduction of the Harrelson oral statements would have been "far more than another attack upon Bello's credibility" *Carter v. Rafferty,* 621 *F. Supp.* at 553; Appendix B at 62a; that the evidence would have enabled the defense to assert "the prosecution had persuaded Bello to return to the 'on-the-street' version not because it was true, but because that is what the 'lie detector' results demanded. xxx Carter could have argued to the jury that Bello was such a malleable witness that he would have testified to either the 'on-the-street' or the 'in-the-bar' version depending upon what he was told the polygraph test showed." 826 *F.*2d at 1308; Appendix A at 18a. The Court also declared the "inconsistency concerning Bello's vantage point at the time of the shootings xxx goes to the very heart of Bello's testimony. It goes to his opportunity and ability to identify Carter and Artis, and to describe their actions and movements." 826 *F.*2d at 1308; Appendix A at 18a-19a.

The selfsame claim of the importance and utility to the defense of the oral statement—that "Bello would have been shown to be an extremely malleable witness whose testimony was manipulated by the State"—was made before, and rejected by, the State Supreme Court, which further was satisfied "(t)he added inconsistency that Bello told Harrelson that he was in the bar was merely cumulative." *State v. Carter,* 91 *N.J.* at 116-118, 449 *A.*2d at 1297; Appendix C at 106a.

The trial court found as fact, accepted as such to be presumptively correct by the Third Circuit, that "(t)he prosecution did not cause Bello to recant his recantation through coercion, deceit or threats of prosecution for perjury; nor did the State misrepresent to Bello the results of the polygraph test to get Bello to go back to the 'on the street' version." (Opinion on remand, Appendix D at

176a; 826 *F.*2d at 1307, Appendix A at 16a). More to the point, the state trial court further found as fact "Bello recanted the recantation when he told Harrelson during the polygraph pre-test interview" that he had been pressured by persons assisting the defense into recanting the 1967 trial testimony (Opinion on remand, Appendix D at 176a). The State Supreme Court declared the fact findings fully supported by the record; that Court noted, again, that Bello had already advised polygraphist Harrelson the repudiation of his first trial testimony was itself untrue before the post-polygraph test interview with the Prosecutor's office personnel "(n)either [of whom] used the polygraph test to coerce or deceive Bello for the purpose of having him switch back to the 'on the street version.'" (Appendix C at 108a). Such demonstrates the fallaciousness of the defense claim it could have asserted the State manipulated Bello to reaffirm, upon retrial, the truth of his first trial testimony by having pressured him with the results of the Harrelson polygraph.*

Further demonstrating the absence of materiality of the undisclosed evidence—the lack of reasonable probability the trial result would have been different—is the fact that, as declared by the State Supreme Court, elicitation of the Harrelson oral statements would have resulted in additional confirmation of guilt, rather than creation of reasonable doubt in Bello's identification. "The Harrelson test results, if laid before the jury, would have established that an eminent polygrapher entertained 'no doubt at all' that Bello was truthful when he identified the defendants as

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* It bears notation that, as emphasized by the state trial judge and State Supreme Court, the "in the bar" version believed by polygraphist Harrelson was *not* the "in the bar version" related by Bello during his period of recantation, wherein he asserted that he was in the bar and witnessed the shooting by two men who were *not* Carter and Artis. While Harrelson believed Bello to be truthful in telling him he was in the bar during the shooting, Harrelson was further convinced Bello's identification was due to his observation of the armed Carter and Artis outside the bar and that no other persons were involved in the shooting. Such was consistent with Bello's 1967 testimony.

the muderers." *State v. Carter,* 91 *N.J.* at 116, 449 *A.*2d at 1296; Appendix C at 105a. The elicitation would also presumably have triggered admission of the opinion of another respected polygraphist (Richard O. Arther) who had also examined Bello prior to the 1976 trial and likewise was convinced of Bello's truthfulness in identifying Carter and Artis outside of the bar after the shootings.

Finally the absence of materiality in the Harrelson oral statements is further demonstrated by the abundance of other evidence pointing to the guilt of Carter and Artis aside from the identification by Bello—another witness's (Patricia Valentine) identification of the Carter vehicle, returned to the scene within twenty minutes after she saw two men run to the car outside the tavern and drive away; a search for weapons by Carter during the hours before the shooting; the recovery from the Carter vehicle of a shotgun shell and handgun bullet, of the same type and caliber as used by the weapons employed in the shooting; the various observations of the Carter vehicle during the minutes after the shooting consistent with involvement therein; the evidence supportive of motive for the killing of the Lafayette Bar and Grill bartender, and the elimination of witnesses (the bar patrons) thereto, in retaliation for the shotgun slaying several hours earlier of another tavern owner whose son was a friend of Carter and Artis*; the admissions of fabricated alibi defense testimony for Carter given at the previous 1967 trial; and the fabrication in Artis' 1976 trial testimony regarding his whereabouts just prior to the shooting and the nature of his relationship with Rubin Carter. As observed by the New Jersey Supreme Court, the undisclosed evidence, again only of essentially cumulative impeachment value, did not possess a reasonable likelihood of affecting the outcome of the trial "particularly so in view of the wealth of other evidence

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* Such was the subject of another ground for issuance of the writ by the District Court, not reviewed by the Third Circuit. Unlike the District Court judge, the New Jersey State Supreme Court found no cause to bar admission of the motive theory and evidence on the ground it constituted impermissible "racial revenge" evidence.

amassed against the defendants." *State v. Carter*, 91 *N.J.* at 118, 449 *A.*2d at 1297; Appendix C at 106a.

Petitioners submit the Third Circuit Court finding of materiality herein, thus sustaining the grant of habeas relief, reflects an inadequate review of the record, is an erroneous conclusion totally contrary to the record and reasoned findings of the state courts, and warrants grant of the petition for certiorari to insure proper application of the standard of materiality set forth in *United States v. Bagley*.

III

THE THIRD CIRCUIT IMPROPERLY DISMISSED THE APPEAL FROM THE GRANT OF THE WRIT TO JOHN ARTIS INASMUCH AS THE NOTICE OF APPEAL WAS TIMELY FILED AND CAPTIONED WITH REGARD TO ARTIS AND THE ENSUING APPELLATE PROCESS CLEARLY CONTEMPLATED REVIEW OF THE GRANT OF RELIEF TO BOTH CARTER AND ARTIS.

On August 21, 1987 the Court of Appeals dismissed the petitioners' appeal as it related to John Artis (826 *F.*2d at 1303; Appendix A at 9a-10a) on the ground that the notice of appeal filed almost two years earlier (November 8, 1985) (Appendix E at 201a) did not apply to John Artis even though the notice contained the caption of the John Artis case and even though upon the filing of the notice the Court of Appeals itself, through the Office of the Clerk, acted as though it believed (as the petitioners did) that the appeal applied to the John Artis case. The Office of the Clerk of the Court of Appeals consistently directed all the appropriate documents, communications and notices to the John Artis' attorneys in the same way it did to the attorneys for Rubin Carter. For example, see the letter of November 15, 1985 from the Court of Appeals to the Artis attorneys (Steel and Raveson) which is referenced with the caption of the Artis case (John Artis v. Christopher Dietz, etc., et al. D.C. Civil No. 85-100) as well as the Carter case (Rubin Carter, et al. v. John Rafferty,

etc., D.C. Civil No. 85-0745) and which says to the Artis lawyers: "This is to advise you that the appeal in the above-captioned case has been docketed in this Court on November 8, 1985 at No. 85-5735." (Appendix F at 202a).

During the pendency of this appeal all parties, as well as the Court, regularly noticed the John Artis attorneys. The attorneys for John Artis briefed and argued the merits of the appeal. Indeed at oral argument the attorney for John Artis directed his presentation to the merits of the appeal and did not address the question of whether the appeal applied to his client until he was directed to do so by Chief Judge John J. Gibbons.

While the notice of appeal filed on November 8, 1985 was captioned with both the Rubin Carter case and the John Artis case, it inadvertently neglected to recite John Artis' name in the body of the notice along with the name of Rubin Carter which was recited. This oversight occurred because of the rush on the petitioners at the time to accomplish the filing and because of the confusion stemming from the fact that Rubin Carter and John Artis were able to pursue their habeas petitions in the federal district court at the same time they were pursuing appeals for new trials in the New Jersey appellate courts.

The petitions for writs of habeas corpus were filed in February 1985 on behalf of Rubin Carter and John Artis respectively, as Docket Nos. 85-745 and 85-1007. Thereafter an order of consolidation was entered with the consent of all parties, since over the long history (almost 20 years) of this case including two trials ten years apart, the issues as to Rubin Carter and John Artis have been considered together.

At the time the habeas petitions were filed in the federal district court, the petitioners were pursuing an appeal in the Appellate Division of the New Jersey Superior Court seeking to overturn the dismissal of motions for new trials. In an attempt to avoid responding to appeals in the New Jersey state court and the federal court simultaneously, the respondents on the habeas petition did not initially

reply to the petitions and instead raised the threshold issue of non-exhaustion of state remedies. Briefs were submitted on the exhaustion issue by both sides.

The district court did not address the non-exhaustion issue and on June 25, 1985 the petitioners filed with the district court a joint motion for summary judgment. A hearing on this motion was scheduled for July 26, 1985.

On July 2, 1985 the New Jersey Appellate Division denied the Carter/Artis appeal. John Artis petitioned for certification to the New Jersey Supreme Court. Rubin Carter did not pursue certification. On July 26, 1985, meanwhile, the federal district court held oral argument on behalf of both Rubin Carter and John Artis on their joint motion for summary judgment. A month after the oral argument (on August 30, 1985) the brief responding to the habeas petition was filed with the district court.

On October 29, 1985, the New Jersey Supreme Court denied the Artis petition for certification. The order of the Supreme Court was received by the parties several days later.

On November 7, 1985, the federal district court issued its 70 page opinion granting the habeas petition of Rubin Carter and reserving decision on the Artis petition for 30 days. Apparently, the district court was not aware at the time of the writing of its opinion, that the exhaustion issue as to Artis had been mooted by the New Jersey Supreme Court's denial of the Artis petition for certification. Later that same day, the respondents on the habeas were advised that the district court would hear argument the following day, November 8, 1985, on whether Rubin Carter should be released from custody (John Artis had been paroled in 1981).

On November 8, 1985, the respondents argued to the district court that Rubin Carter should not be released since the respondents had decided to appeal the decision of the district court to the Court of Appeals. The district court was advised that a notice of appeal had been filed

and the Court was asked to consider whether Rubin Carter's release posed a danger to the community.

The respondents intended the appeal to be taken from the issuance of the respective writs of habeas corpus as to the petitioners Carter and Artis. Accordingly one notice of appeal captioned as to both petitions was prepared by the attorney assigned. Because of the limited time available before the hearing, partly because of the uncertainty as to the status of the petitioner Artis noted in the opinion of the district court and partly through inadvertence, the name of the petitioner Artis was not included in the body of the notice of appeal. However, the notice of appeal was captioned in both petitions and stated that one of the respondents appealing was Christopher Dietz, Chairman of the Parole Board of the State of New Jersey, who was a respondent to the petition of John Artis, but not a respondent to the petition of Rubin Carter.

At the hearing before the district court on November 8, 1985, the attorney for John Artis informed the Court that the exhaustion issue as to Artis had been disposed of because of the denial of the certification petition by the New Jersey Supreme Court and consequently requested that the Court issue the writ of habeas corpus as to Artis. The respondents agreed that this formality was in order. The Court then indicated it would sign orders as to both petitioners and the hearing relating to Rubin Carter's enlargement ensued. The district court refused to stay enlargement and granted Rubin Carter immediate release. Counsel for the respondents as well as for the petitioner Carter thereupon removed to the adjacent Chambers of the Honorable John J. Gibbons, Judge of the United States Court of Appeals for the Third Circuit. Judge Gibbons heard an application by the habeas respondents for a stay of the order of enlargement as to the petitioner Carter. Judge Gibbons denied the same. It was at approximately 5:00 p.m. the respondents received from the district court a copy of the respective orders granting writs of habeas corpus as to petitioners Carter and Artis. Each order was stamped as filed at 4:48 p.m. As previously indicated, the

respondents' notice of appeal had been filed approximately an hour earlier.

(It should be noted that the respondents on the habeas petition appealed to the United States Court of Appeals for the Third Circuit to revoke the enlargement granted to Rubin Carter by the district court. The respondents' application was denied by the Court of Appeals. *Carter v. Rafferty*, 781 *F.*2d 993 (3d Cir. 1986). Thereafter the basis of the holding of the Court of Appeals in *Carter v. Rafferty* was reversed by this Court. *Hilton v. Braunskill*, 481 *U.S.* ___, 107 *S. Ct.* 2113, 95 *L. Ed.*2d 724 (1987).)*

The attorneys for John Artis did not state their position that the appeal did not apply to Artis until after the expiration of the 60-day limit for filing an appeal (30 days to file notice of appeal *R.* 4(a)(1), F.R. App. P.; and an additional 30 days based on excusable neglect or good cause *R.* 4(a)(5), F.R. App. P.). The attorneys for John Artis first stated the position that the appeal did not apply to Artis in a letter to the district court dated January 9, 1986, which is the 61st day after the filing of the notice of appeal. This, notwithstanding the fact that on November 15, 1985, the Office of the Clerk of the Court of Appeals notified the Artis attorneys that the appeal had been filed and docketed in the Artis case (D.C. Civil No. 85-1007) as well as the Carter case (D.C. Civil No. 85-0745).

The Artis attorneys notified the Court of Appeals of their position by a letter dated January 22, 1986 (Appendix G at 205a). This letter was considered by the Court as a motion to dismiss the appeal as to John Artis. By order of Judge John J. Gibbons dated March 25, 1986, the Artis motion to dismiss the appeal was referred to the merits panel which ultimately consisted of Judges Gibbons, Aldisert and Weiss (Appendix I at 210a-211a).

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* Petitioners understand that during argument in *Hilton* Justices Blackmun and Marshall inquired why we had not sought *certiorari* from the Third Circuit's judgment on the enlargment issue in *Carter v. Rafferty, supra.*

On April 15, 1986, the attorney for John Artis entered his appearance with the United States Court of Appeals (Appendix J at 212a-215a). The Artis attorneys joined in all proceedings thereafter and submitted their brief to the Court.

The Artis motion to dismiss the appeal was not raised again until over a year later when Judge John J. Gibbons raised it on June 22, 1987, at the very beginning of oral argument on the appeal in chief. The appellants were surprised that Judge Gibbons raised this point, since the Artis attorneys had actively been involved in the appeal for so long and since they had submitted their brief on the merits of the appeal and had not argued this point in their brief.

The determination of the Court of Appeals that the appeal of the district court's decision did not apply to John Artis is an intolerable elevation of form over substance. It makes a sham of basic, essential concepts of American justice. John Artis had twice been convicted of three counts of first degree murder. His attorney was present in the district court on November 8, 1985, when the Court was advised of the appeal and received a copy of the notice at that time. The Office of the Clerk of the Court of Appeals believed that this notice of appeal applied to the John Artis case. The attorneys for John Artis were involved in the appeal for over a year before oral argument. The Artis attorneys briefed and argued the merits of the appeal.

The Artis attorneys never suggested that they were misled or prejudiced in any way. The intent of the appellants was clear from the outset. The appellants noticed the Artis attorneys on every communication and pleading involved in the appeal. In *Sanabria v. United States*, 437 *U.S.* 54, 67-68, 98 *S. Ct.* 2170, 2180, 57 *L. Ed.*2d 43, 56 (1978), this Court reversed the Court of Appeals and determined that a mistake in a notice of appeal was not fatal when the intent of the appellant could be inferred from the notice of appeal and the other party was not misled or prejudiced.

This Court has interceded to set aside hypertechnical applications of procedural rules that defeat the ends of justice. Under circumstances similar to this case, this Court reversed the Court of Appeals in *United States v. Arizona*, 346 *U.S.* 907, 74 *S. Ct.* 237, 98 *L. Ed.* 405 (1953) see same case below, 206 *F.*2d 159 (9th Cir. 1953).

In *Hoiness v. United States*, 335 *U.S.* 297, 300-301, 69 *S. Ct.* 70, 71-72, 93 *L. Ed.* 16, 19-20 (1948), this Court reversed the Court of Appeals' dismissal of an appeal, noting that it was congressional policy that the niceties of form be disregarded and that judgment be given as the right of the cause appeared to the court. This Court stated that it was hypertechnical for the Court of Appeals to conclude that the appeal papers did not bring the matter before the Court. See *State Farm Mutual Automobile Ins. Co. v. Palmer*, 350 *U.S.* 944, 76 *S. Ct.* 321, 100 *L. Ed.* 823 (1956), see same case below, 225 *F.*2d 876 (9th Cir. 1955), reversing the Court of Appeals' dismissal of an appeal because of a defect in the appeal papers when the intent of the appellant was clear.

Petitioners respectfully submit *certiorari* should be granted to review and set aside the dismissal of the appeal improvidently ordered by the Third Circuit.

CONCLUSION

Based upon the foregoing reasons this petition for certiorari should be granted. The determination of materiality rendered by the state courts should be entitled to the presumption of correctness in federal habeas corpus proceedings, the undisclosed evidence herein should be held to be not material, and the dismissal of the appeal to the Third Circuit regarding the grant of relief to respondent Artis should be set aside.

Respectfully submitted,

JOHN P. GOCELJAK
Special Deputy Attorney General-In-Charge
Acting Passaic County Prosecutor
Attorney for Petitioners
Counsel of Record

Of Counsel and on the Petition:

RONALD G. MARMO
Special Deputy Attorney General
Acting Chief Assistant Prosecutor

GARY H. SCHLYEN
Special Deputy Attorney General
Acting Senior Assistant Prosecutor

DATED: November 12, 1987

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-5735

RUBIN CARTER and JOHN ARTIS

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, and IRWIN I. KIMMELMAN, THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY
(D.C. Civil No. 85-0745)

JOHN ARTIS

vs.

CHRISTOPHER DIETZ, CHAIRMAN, PAROLE BOARD OF THE STATE OF NEW JERSEY and IRWIN I. KIMMELMAN, THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY
(D.C. Civil No. 85-1007)

John J. Rafferty, Superintendent, Rahway State Prison, Christopher Dietz, Chairman, Parole Board of the State of New Jersey, and Irwin I. Kimmelman, Attorney General of the State of New Jersey.

Appellants

Appeal from the United States District Court
for the District of New Jersey (Newark)
(D.C. Civil No. 85-0475 & 85-1007)

Argued
June 22, 1987

Before: GIBBONS, *Chief Judge*,
WEIS and ALDISERT, *Circuit Judges*.
(Filed August 21, 1987)

JOSEPH A. FALCONE, Esq.
PASSAIC COUNTY PROSECUTOR
New Courthouse
Paterson, New Jersey

JOHN P. GOCELJAK, Esq.
First Assistant Prosecutor
Of Counsel and on the Brief

RONALD G. MARMO, Esq. (ARGUED)
Chief Assistant Prosecutor
Of Counsel and on the Brief

COUNSEL FOR APPELLANTS

LEON FRIEDMAN, Esq. (ARGUED)
Hofstra University Law School
Hempstead, New York 11550

COUNSEL FOR APPELLEES CARTER AND ARTIS

Myron Beldock, Esq.
Edward S. Graves, Esq.
Beldock, Levin and Hoffman
565 Fifth Avenue
New York, New York 10017

COUNSEL FOR APPELLEE CARTER

LEWIS M. STEEL, Esq. (Argued)
STEEL BELMAN AND LEVINE
351 Broadway
New York, New York 10013

COUNSEL FOR APPELLEE ARTIS

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The major question for decision in this appeal from the district court's grant of a writ of habeas corpus is whether the state of New Jersey violated the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose to the defendant certain reports of a lie detector test administered to an important prosecution witness. The district court determined that this evidence was material to the defendant's guilt or innocence and therefore that its suppression denied him due process. We conclude that the district court did not err and therefore will affirm the judgment.

I.

The underlying facts may be distilled from the many recorded opinions in this highly publicized case. At approximately 2:30 a.m. on June 17, 1966, two armed men entered the Lafayette Bar & Grill in Paterson, New Jersey and opened fire. The bartender, James Oliver, and a patron, Fred Nauyaks, were killed immediately. A second patron, Hazel Tanis, died one month later from her wounds and a third patron, William Marins, was partially blinded after being shot in the head.

Patricia Valentine lived above the tavern and was awakened by the sound of gunshots at about 2:30 a.m. She ran to her window and saw two men leave the scene in a white car. At the same time, Alfred Bello and Arthur Bradley were breaking into a nearby factory. Bello, who was standing lookout, was either in or outside the bar, and his location at that time is a main point of contention for the *Brady* issue. Within minutes, police arrived at the scene and took statements from Marins, Valentine and

Bello. The officers transmitted a description of the car on police radio. A few minutes later, a Paterson police officer stopped a white car leased by Rubin Carter, a well-known prize fighter, approximately 14 blocks away from the Lafayette Bar. John Artis was driving, John Royster was sitting in the front seat, and Carter was alone in the back seat. The car had not been speeding and there were no weapons in sight. Carter told the officer that the men were driving to his home about six blocks away to obtain money, and the officer allowed them to proceed. Fifteen minutes later, police observed Carter's car outside the La Petite Bar, approximately 10 blocks west of the Lafayette. Five minutes later, police sighted the car a third time, with only Carter and Artis inside. This time the police escorted the car and its occupants to the crime scene.

From the evidence, it appears that at the original questioning neither Bello nor Valentine identified Carter or Artis at the scene, and there is considerable dispute as to the identification of the car. The police took Carter and Artis to the station and then to the hospital where the two survivors failed to identify them. They were questioned. Both Carter and Artis were given polygraph examinations. They were released about 7 p.m. on June 17. Meanwhile, police searched the car and allegedly found a live .12 gauge shotgun shell in the trunk and a live .32 caliber shell on the floor of the front seat, the same calibers as the weapons used in the Lafayette shootings.

Subsequently, Carter and Artis voluntarily testified before a Passaic County Grand Jury which did not return any indictments. In July and October, however (and apparently for the first time), Bello told a Paterson police officer that he had seen Carter and Artis at the crime scene. Bello and Bradley then identified Carter as one of the two men they saw coming from the Lafayette Bar with weapons in their hands. Bello, but not Bradley, identified Artis as the second man.

At least in part as a result of these identifications, in 1967 Carter and Artis were indicted, tried and convicted of three counts of first degree murder. On June 29, 1967, the trial judge imposed life sentences after a jury recommendation of mercy. The New Jersey Supreme Court affirmed the convictions on direct appeal. *State v. Carter*, 54 N.J. 436, 255 A.2d 746 (1969), *cert. denied*, 397 U.S. 948 (1970).

On October 1, 1974, Carter and Artis filed a new trial motion based on the statements of the prosecution's two key witnesses—Bello and Bradley—recanting their 1967 identification testimony. The original trial judge denied the motion. *State v. Carter*, 136 N.J. Super. 271, 345 A.2d 808 (1974). A second new trial motion based on other grounds was made on January 30, 1975 and was also denied. *State v. Carter*, 136 N.J. Super 596, 347 A.2d 383 (1975). The New Jersey Supreme Court reversed, overturned the convictions, and ordered a new trial. *State v. Carter*, 69 N.J. 420, 354 A.2d 627 (1976). The court determined that the prosecution had withheld certain evidence from the defense. Such evidence indicated that prosecutors had offered the key identification witnesses both protection of their persons and assistance with criminal charges that were then pending or contemplated against them. The case was remanded to the trial court where, after numerous motions and hearings, the retrial began on October 12, 1976.

Although Carter and Artis contend that their 1976 trial was constitutionally deficient in several respects, we find the *Brady* issue to be dispositive. At the 1967 trial, Alfred Bello testified that he had seen Carter and Artis carrying weapons on the street outside the bar immediately after the killings. As noted above, however, Bello recanted portions of this testimony in 1974 and continued to revise his story during 1975 and 1976. As a recantation hearing in October 1974, he said he could not identify either Carter or Artis as having been near the Lafayette Bar & Grill

after the shootings. During August 1975, Bello made a series of tape recordings with Melvin Ziem and Joseph Miller in which he recounted several additional versions of the events following the Lafayette Bar killings. On October 30, 1975, Bello stated in an affidavit that he had been "in the bar"—not on the street—at the time of the shootings, and that immediately afterward he ran outside where he saw Carter and Artis on the street. Bello said he did not remember seeing them in the bar and he did not believe they were the trigger men, but thought they were somehow involved. In another affidavit executed the next day, Bello said that he had not seen Carter and Artis with weapons or in the bar. In another version of the story—presented to an Essex County grand jury in December 1975 and to the prosecution in June 1976—Bello said that he was in the bar where he saw two other men, while Carter and Artis waited outside.

Before the second trial of Carter and Artis, the state arranged for a polygraph examination by Professor Leonard H. Harrelson which took place on August 7, 1976. The purpose of the examination was to evaluate Bello's credibility. As a result of the polygraph, Harrelson concluded that Bello was telling the truth when he said he was in the bar shortly before and at the time of the shooting. He also concluded that Bello saw Carter and Artis outside the bar after the shooting. The same day, Harrelson gave an oral report of his findings to Passaic County Assistant Prosecutor Kayne and Chief of Detectives DeSimone. DeSimone told Harrelson that the polygraph examiner's conclusion was impossible: that Bello could not have been inside the bar at the time of the shooting.

On August 11, 1976, Harrelson repeated his conclusions by telephone. Two weeks later, Harrelson filed a written report with the prosecutor's office. That report summarized his conclusions by stating that: "After careful analysis of [Bello's] polygrams, it is the opinion of the examiner that [Bello's] 196[7] testimony at the trial was true, and

the statement recanting his original statement is not true." App. Vol. 4E at 623. As noted above, however, Bello testified at the 1967 trial that he had been on the street at the time of the shooting; in his oral reports to the prosecutor and police, Herrelson concluded that Bello was telling the truth when he said that he had been in the bar at the time of the shooting. To this extent, Harrelson's written report contradicted his earlier oral reports.[1] The prosecution disclosed to the defense Harrelson's written report, but did not disclose the substance of the earlier oral reports. At trial, Bello testified—consistent with his

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[1] There appears to be some reason for this discrepancy. Harrelson had never read Bello's 1967 testimony. Harrelson had been told that Bello identified Carter and Artis in 1967; the examination supported the veracity of that identification. Harrelson apparently did not know that in 1967 Bello testified that he had been on the street at the time of the shooting and therefore was unaware that the polygraph results contradicted this aspect of Bello's 1967 testimony. In his dissent to the opinion of the New Jersey Supreme Court, Justice Clifford described the attendant confusion:

> For reasons that can charitably be described as unfortunate, in his later written report of his test the polygraphist summarized his findings with the opinion that Bello's 1967 trial testimony (which contained the "on-the-street" version) was "true": unfortunate, because Harrelson had never read Bello's 1967 testimony and no representative of the prosecution had enlightened him as to that testimony and hence he was plainly—and grievously—mistaken as to the location from which Bello said, in 1967, that he had witnessed the events before and after the slayings; doubly unfortunate, because although the State continued to promote the notion that Harrelson's "in-the-bar" conclusion was only tentative, Harrelson specifically and adamantly insisted that he never used those or any similar words or ever made the statement to "anyone at all on the face of the earth that [he] was unsure of Bello's test results * * *"; and, most unfortunate of all, because the prosecution never told the defense the critical finding of Harrelson's test—that Bello was in the bar.

State v. Carter, 91 N.J. 86, 134, 449 A.2d 1280, 1306 (1982) (Clifford, J., dissenting) (footnote omitted).

1967 testimony but contrary to the finding expressed in Harrelson's oral reports—that he had been on the street during the shootings. No evidence of Harrelson's polygraph examination was introduced at trial.

On December 22, 1976, the jury returned first degree murder verdicts against Carter and Artis. Carter and Artis appealed to the appellate division of New Jersey Superior Court and the New Jersey Supreme Court. The New Jersey Supreme Court ultimately remanded a new trial motion to the trial court for a hearing on issues surrounding the polygraph test. *State v. Cater*, 85 N.J. 300, 426 A.2d 501 (1981). The remand hearing lasted 15 days. In an 80-page unreported opinion the judge found against the defense on all issues. On appeal from this decision, the supreme court decided two things: first, and unanimously, that a *Brady* violation had occurred; second, by a 4-3 majority, that Carter and Artis failed to establish that the suppressed evidence would "have been material to the outcome." *State v. Carter*, 91 N.J. 86, 119, 449 A.2d 1280, 1297 (1982). The majority ruled that the suppressed evidence was merely cumulative. *Id.* at 118, 449 A.2d at 1297. The dissent, however, felt that the evidence was material. *Id.* at 135-40, 449 A.2d at 1307-09 (Clifford, J., dissenting).

Carter and Artis submitted petitions for habeas corpus to the United States District Court for the District of New Jersey on February 13 and 28, 1985, respectively; the actions were later consolidated. On November 7, 1985, the district court granted petitioners' motion for summary judgment, basing its decision on two of the twelve grounds advanced by petitioners: first, that the prosecution violated the requirements of the fourteenth amendment due process clause by asserting a "racial revenge" motive for the murders; and, second, that the state violated the requirements of *Brady v. Maryland* by failing to disclose the results of the lie detector test administered to Bello shortly before the second trial. *Carter v. Rafferty*, 621 F. Supp. 533 (D.C. N.J. 1985). Our decision on the *Brady* issue makes it un-

necessary for us to address the first basis of the district court's judgment.

II.

As a preliminary matter, we hold that appellants have effectively appealed from only that portion of the district court's judgment relating to Rubin Carter. The notice of appeal, filed on November 8, 1985, specifically limited itself to the order releasing Carter:

> Notice is hereby given that [appellants] hereby appeal to the United States Court of Appeals for the Third Circuit from the order granting petitioner Carter's habeas corpus petition and releasing petitioner Carter from the custody of the State of New Jersey entered in this action on the 8th day of November, 1985.

App. Vol. 1D at 79-80. Moreover, although appellants maintain that they "intended the appeal to be taken from the issuance of the respective writs of habeas corpus as to Petitioners Carter and Artis," they concede that "[b]ecause of the limited time available before the [enlargement] hearing, partly because of the uncertainty as to the status of Petitioner Artis noted in the Opinion of the District Court, and partly through inadvertence, the name of Petitioner Artis was not included in the body of the notice of appeal." Reply of Respondents to Motion of Petitioner-Appellee John Artis to Dismiss Appeal at 5. (Affidavit of John P. Goceljak.)

Rule 3(c), F. R. App. P., requires that "[t]he notice of appeal .... shall designate the judgment, order *or part thereof* appealed from ..." (emphasis supplied). Because the notice here is silent as to Artis, it effectively challenges only that portion of the district court's judgment granting relief to Carter. *See Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977) (per curiam). Appellants have failed to file a timely notice of appeal with respect to the grant of relief to Artis. Their failure deprives this

court of jurisdiction: "Where the litigant fails to file a timely notice of appeal within the prescribed period, the litigant loses the right to an appeal on the merits of the predicate controversy." *West v. Keve*, 721 F.2d 91, 95 (3d Cir. 1983) (footnote omitted). Accordingly, we will dismiss appellants' appeal as it relates to John Artis.

III.

Ordinarily on appeal of a district court's disposition of an application for writ of habeas corpus, the district court's findings of fact are reviewed under the clearly erroneous standard and its application and interpretation of legal precepts are subject to plenary review. *Sullivan v. Cuyler*, 723 F.2d 1077, 1082 (3d Cir. 1983). Because this action was decided on a motion for summary judgment, however, the appellate court is required to apply the same test that the district court should have used initially under Rule 56(c), F.R.Civ.P.: summary judgment is properly granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *See King v. Brewer*, 577 F.2d 435, 439 (8th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979). In making this determination, all reasonable inferences must be drawn in favor of the non-movant. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Moreover, subject to certain exceptions, factual determinations made by a state court after a hearing on the merits "shall be presumed to be correct." 28 U.S.C. § 2254(d); *see Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

IV.

In *Brady v. Maryland*, the Supreme Court held that a defendant's due process right to a fair trial is violated when the prosecution withholds evidence that is both favorable to the accused and "material either to guilt or to

punishment." 373 U.S. 83, 87 (1963). *See also Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). The purpose of the *Brady* rule is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is required to disclose only that evidence favorable to the accused which, if suppressed, would deprive the defendant of a fair trial. "[U]nless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Accordingly, "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.*

The Court has explained that in addition to exculpatory evidence, the *Brady* rule covers evidence that might be used for impeachment purposes. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Impeachment evidence is thus "evidence favorable to an accused," *Brady*, 373 U.S. at 87, where, if disclosed and used effectively, it may make the difference between conviction and acquittal. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Accordingly.

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule [of *Brady*]. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict[."] . . . A finding of materiality of the evidence is required under *Brady*. . . . A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ."

Giglio, 405 U.S. at 154 (citations omitted).

Notwithstanding the convoluted fact situation and the many facets of the teachings of *Brady*, this appeal turns on one issue and one issue alone: were Harrelson's oral reports of Bello's polygraph examination material? In the view we take this is the centerpiece of this appeal. It bears mention that this was also the controlling issue that faced the New Jersey Supreme Court; as stated before, on a narrow division of 4-3, that court found that the oral reports were not material in the context of *Brady*.

Appellants apparently concede that the reports should have been turned over to the defense before trial. *See* br. for respondents-appellants at 43-44. They maintain, however, that the reports were not "material" under the controlling legal standard:

> [E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Bagley, 473 U.S. at 682. *See also id.* at 685 (White, J., concurring in part and concurring in the judgment).

Carter's theory is that the prosecution used Harrelson's written report to pressure Bello to return to his 1967 "on the street" testimony. He contends that if he had known of Harrelson's contradictory oral reports, he would have used this information to impeach Bello's credibility at trial and thus undermine an essential basis for the guilty verdict. The district court agreed, and, casting its lot with the New Jersey Supreme Court dissenters, held that the oral reports were "material" evidence under *Bagley*. Appellants offer three grounds in their challenge to the determination of materiality.

A.

They first contend that the district court employed an inappropriate standard for reviewing the state court decisions on the *Brady* issue. The New Jersey Supreme Court determined that although the evidence of Harrelson's oral reports should have been disclosed to the defense, it was "neither material nor of the sort that would lead to a change in the jury's verdict." *State v. Carter*, 91 N.J. 86, 121, 449 A.2d 1280, 1299 (1982). The state trial court had previously determined, after an evidentiary hearing, that it was not material because the defense had ample opportunity to impeach Bello at trial and therefore "the undisclosed information was merely cumulative and/or repetitious as to the purpose for which it could have been used. . . ." *State v. Carter*, No. 167-66, slip op. at 74 (N.J. Super. Ct. Law Div.: Passaic Cty. Aug. 28, 1981), *reprinted in* app. Vol. 1E at 134; *see also id.* at 56-57, *reprinted in* app. Vol. 1E at 116-7. Appellants contend that the district court erred because it failed to accept the state trial court's determination. The district court, argue the appellants, "did not accord the state trial court the level of deference required by 28 U.S.C. § 2254(d)" on the issue of materiality. Br. for respondents-appellants at 48; *see also* reply br. for respondents-appellants at 23-24. It now becomes our task to analyze the degree of constraint or freedom possessed by a federal habeas corpus court after a state trial court has made a ruling on materiality in the context of *Brady*. Our starting point is the federal habeas corpus statute.

Section 2254(d) provides that

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for

> the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear. . . .

28 U.S.C. § 2254(d). Neither this court nor the Supreme Court has precisely decided whether a determination concerning materiality is presumptively correct under section 2254(d). It is clear, however, that the presumption of factual correctness may not apply to mixed questions of law and fact. *See Miller v. Fenton*, 474 U.S. 104, ____ (1985)[2] Although the Court has acknowledged that "[i]t will not always be easy to separate questions of 'fact' from 'mixed questions of law and fact' for § 2254(d) purposes," *Wainwright v. Witt*, 469 U.S. 412, 429 (1984), we are safe in suggesting that the Court adheres to the view that the presumption applies only to "'basic, primary or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators. . . ."'" *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980) (citations omitted); *see Wainwright*, 469 U.S. at 428 n.8.

Cases from the Fifth, Seventh and Tenth Circuits hold that determinations of materiality of evidence under *Brady* are mixed questions of law and fact and that state court determinations are therefore not entitled to section 2254(d)'s presumption. *See, e.g., Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir.), *cert. denied*, 107 S.Ct. 458 (1986); *Ruiz v. Cady*, 635 F.2d 584, 589 (7th Cir. 1980); *Davis v. Heyd*, 479 F.2d 446, 451 (5th Cir. 1973). This court recently suggested that this is the better approach. *See Daniel v. Warden, State Correction Institute*, 794 F.2d 880, 882-83 (3d Cir. 1986) (double jeopardy mixed question;

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[2] *Miller* effectively overruled *Patterson v. Cuyler*, 729 F.2d 925, 930-32 (3d Cir. 1984) (section 2254(d) presumption applies to mixed questions of law and fact). *See Miller v. Fenton*, 474 U.S. 104, ____ n.3 (1985); *Holland v. Attorney General of New Jersey*, 777 F.2d 150, 153 n.1 (3d Cir. 1985).

therefore, no presumption); *see also Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102-03 (3d Cir. 1981); *cf. TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (materiality of misrepresentation or omission under securities laws mixed question of law and fact). Appellants have not cited any case in which a state court's determination of *Brady* materiality was presumed correct under section 2254(d).

Accordingly, we now decide that the materiality of evidence under *Brady* is a mixed question of law and fact and that state court determinations of the law portions of this mixture are not entitled to a presumption of correctness under section 2254(d). We hold that the district court did not err in failing to apply the presumption to the New Jersey courts' legal conclusions as to the polygraph reports as cumulative and immaterial.

B.

Appellants next contend that Harrelson's oral reports were not material because "the only use the defense could have made of [them] would be to impeach Bello—a merely cumulative and repetitious endeavor since numerous prior, contradictory statements of Bello saying he was in the bar had already been brought out." Br. for respondents-appellants at 47. The district court rejected appellants' characterization of Harrelson's oral reports. Instead, it accepted Carter's theory that the police or prosecution confronted Bello with the results of the polygraph test to persuade Bello to return or adhere to the "on the street" testimony of the 1967 trial. *Carter v. Rafferty*, 621 F. Supp. at 553-54; *see also* br. for petitioners-appellees at 38-40. Appellants challenge this determination and argue that the New Jersey trial court was correct when it concluded that any further cross-examination of Bello would have been cumulative and repetitious and, therefore, not material under *Brady*.

We note at the outset the New Jersey trial court's determination that "[t]he prosecution did not cause Bello to recant his recantation through coercion, deceit or threats of prosecution for perjury; nor did the State misrepresent to Bello the results of the polygraph test to get Bello to go back to the 'on the street' version". *State v. Carter*, No. 167-66, slip op. at 55, *reprinted in* app. Vol. 1E at 115. This finding is clearly a "fact", presumptively correct under section 2254(d). *See Cuyler v. Sullivan*, 446 U.S. at 342. But it is only a factual component of the mixed question of fact and law. Accordingly, the trial court's determination does not compel the conclusion that the defense could not have effectively used knowledge of Harrelson's oral reports to further impeach Bello's testimony.

Read in context, the trial court's determination that the prosecution did not "misrepresent" the polygraph results suggests only that the prosecution acted in good faith. *See, e.g., State v. Carter*, No. 167-66, slip op. at 26, *reprinted in* app. Vol. 1E at 86 ("I conclude then that it was not the State's *misuse* of the polygraph test that caused Bello to revert back to the 1967 trial testimony."); *id.*, slip op. at 31-32, *reprinted in* app. at 91-92 (Although "[t]he [polygraph pre-] test interview was what triggered Bello to return to his original 1967 trial version, the prosecution did not misrepresent the test results to turn Bello around nor did the State threaten Bello with prosecution for perjury in order to coerce him into recanting the recantation.")

But the good faith of the prosecution is not in issue. As the district court noted.

> a finding of intentional misconduct on the part of the prosecution . . . makes no real difference under the factual circumstances of this case. Whether the conduct was deliberate or negligent, the consequences to the petitioners were the same: they were deprived of a vital opportunity to totally discredit the key and

> only eyewitness to the crime. Indeed, if the trial court knew and was satisfied that Bello finally selected one of his many versions merely because he was told that it was independently confirmed by the polygrapher (albeit mistakenly), it might well have stricken his entire testimony.

Carter v. Rafferty, 621 F. Supp. at 553.

The New Jersey trial court made ample findings of fact to support this theory. The court noted that at the hearing on remand, "[w]hen referring to the testimony he had given at the 1976 trial, Bello indicated that the polygraph was what brought him back to the 1967 trial version." *State v. Carter*, No. 167-66, slip op. at 26, *reprinted in* app. Vol. 1E at 86. The trial court determined that "[t]he test interview was what triggered Bello to return to his original 1967 trial version." *Id.* at 31, *reprinted in* app. Vol. 1E at 91. Moreover, there was other evidence presented at the remand hearing not mentioned in the trial court's opinion that conclusively demonstrated the importance of the polygraph results in shaping Bello's testimony at the 1976 trial. *See State v. Carter*, 91 N.J. 86, 135-37, 449 A.2d 1280, 1307-08 (1982) (Clifford, J., dissenting) (after reviewing the record evidence, "[t]he conclusion is inescapable that . . . the 'wrong' test result was fed to Bello to 'break' him").[3]

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[3] Similarly, the New Jersey appellate courts recognized the importance of the polygraph results in shaping Bello's 1976 trial testimony.

> On August 7, 1976, again at the direction of the prosecutor, Harrelson examined Alfred Bello using standard polygraph procedure. The purpose of the examination was to ascertain whether Bello's testimony at the 1967 trial was true or whether his statement recanting his original testimony was true. After administering the tests, Harrelson submitted a report to the prosecutor in which he stated his conclusion:
>
> > After careful analysis of this Subject's polygrams, it is the opinion of the examiner that his 1966 [sic] testimony at the

As the district court noted, under these circumstances, the introduction of Harrelson's oral reports would have been "far more than another attack upon Bello's credibility." *Carter v. Rafferty*, 621 F. Supp. at 553. If Carter's counsel had "had the relevant information, they would have had the means to convince the jury that Bello selected one of several versions, possibly all untrue, merely because he mistakenly believed it had been confirmed by a polygraph test." *Id.* Reduced to its essence, the issue comes to this: had the prosecution properly disclosed Harrelson's oral reports Carter would have been in a position to argue that the prosecution had persuaded Bello to return to the "on-the-street" version not because it was true, but because that is what the "lie detector" results demanded. This is more than mine-run cumulative evidence. Carter could have argued to the jury that Bello was such a malleable witness that he would have testified to either the "on-the-street" or the "in-the-bar" version depending upon what he was told the polygraph test showed. Moreover, we will not accept appellants' contention that the added inconsistency concerning Bello's vantage point at the time of the shootings—in the bar or on the street—was merely cumulative. That inconsistency goes to the very heart of Bello's testimony. It goes to his opportunity and ability to

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> trial was true, and the statement recanting his original statement is not true.
>
> *Bello was confronted with this result and admitted it.* Prior to the polygraph Bello had maintained the in-the-bar version which he had related to the Essex County Grand Jury. *After the interrogation which followed the test, he returned to his 1967 trial testimony.* . . . Bello stayed with this 1967 on-the-street version and testified to it at the 1976 trial.

State v. Carter, Nos. A-5166-76, A-5167-76, slip op. at 19-20 (Super. Ct. N.J. App. Div. Oct. 11, 1979 (emphasis supplied), *reprinted in* app. Vol. 1E at 19-20. *See also State v. Carter*, 85 N.J. 300, 308-09, 426 A.2d 501, 505 (1981).

identify Carter and Artis, and to describe their actions and movements.

C.

We now turn to the strength or fragility of the state's case against Carter as a whole. We must do this because in *United States v. Agurs*, the Court teaches that "[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of minor importance might be sufficient. . . ." 427 U.S. 97, 112-13 (1976). Thus, the materiality of the withheld evidence may depend on the closeness of the case. Appellants argue that "[g]iven the overwhelming evidence of guilt presented by the prosecution, the fact that it was not what might be called a close case. . . . the district court had no justifiable basis upon which to find a reasonable probability of a different trial result." Br. for respondents-appellants at 47. They contend that the prosecution's failure to disclose Harrelson's oral reports should not "undermine confidence in the outcome." *Bagley*, 473 U.S. at 682; *see* br. for respondents-appellants at 4-37. As can be expected, Carter argues the reverse. He contends that the case against him was weak and that further impeachment of Bello's testimony would have been decisive. *See* br. for petitioners-appellees at 3-27.

The district court substantially adopted Carter's characterization of the evidence. After reviewing the record evidence as a whole, the district court concluded that

> [e]ven at its strongest links, the government's chain of evidence has been substantially called into question by petitioners. Therefore, considering the totality of the circumstances, the court concludes that had the evidence withheld by the state involving Harrelson's oral report been disclosed to the defense, there is a

> reasonable probability that the result of the trial would have been different.

Carter v. Rafferty, 621 F. Supp. at 558.

Before us, both parties issue a joint invitation requesting us to follow the lead of the district court and the various New Jersey courts in reviewing and re-evaluating the totality of evidence presented at the 1976 trial. Yet such an exercise necessarily requires the reviewing court to engage in speculation. *See United States v. Pflaumer*, 774 F.2d 1224, 1241 (3d Cir. 1985) (Gibbons, J., dissenting), *cert. denied*, 106 S. Ct. 1263 (1986). But the general uncertainties inherent in this endeavor are minimized here, because under any reasonable characterization of the 1976 trial, the critical importance of Bello's testimony to the prosecution's case clearly looms large and commanding. Bello's eyewitness identification testimony was the only direct evidence placing Carter and Artis at the Lafayette Bar & Grill. Bello's credibility, as well as his opportunity and ability to observe the gunmen at the crime scene, has to be considered an issue that is crucial to the guilt-finding process. We are not confronted by a situation in which the suppressed evidence—here, information impeaching Bello's credibility and challenging his professed vantage point—was of only "minor importance." *See Agurs*, 427 U.S. at 113. Justice Clifford noted in dissent, and we agree, that a complete account of Harrelson's polygraph examinations and the prosecution's use of his conflicting oral and written conclusions had

> the real capacity . . . to bring about the utter destruction of by far the most important witness in the State's arsenal, with the fallout levelling the vaunted polygraphists and casting doubt on the tactics of the prosecution [.] Never before [this information was uncovered] could defendants argue so persuasively that Bello was in all respects a complete, unvarnished liar, utterly incapable of speaking the truth.

State v. Carter, 91 N.J. 86, 139, 449 A.2d 1280, 1309 (1982) (Clifford, J., dissenting).

We therefore conclude that Bello's testimony was critical to the prosecution's case. His credibility was a crucial issue for the jury. From this, it must necessarily follow that there is a "reasonable probability" that the "result of the [trial] would have been different" had the prosecution properly disclosed to Carter Harrelson's oral reports, *see Bagley*, 473 U.S. at 682, because Bello's believability was all important. Accordingly, we hold that the district court did not err in concluding that the reports were "material" under *Brady*.[4]

VI.

To the extent that this appeal challenges the district court's judgment with respect to John Artis, it will be dismissed for lack of jurisdiction. The district court's judgment with respect to Rubin Carter will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[4] Appellants additionally contend that even if Harrelson's oral reports had been disclosed, Carter would not have introduced this evidence at trial. Br. for respondents-appellants at 43-44, 46-48. This argument is supported only by appellants' speculation and misconstrues Carter's theory of how he could have used the reports to impeach Bello. Accordingly, we discern no merit in appellants' contention.

APPENDIX B

RUBIN CARTER,

Petitioner,

v.

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and Irwin I. Kimmelman, The Attorney General of the State of New Jersey,

Respondents.

JOHN ARTIS,

Petitioner,

v.

Christopher Deitz, Chairman, Parole Board of the State of New Jersey and Irwin I. Kimmelman, the Attorney General of the State of New Jersey,

Respondents.

Civ. A. No. 85-745.
No. 85-1007.

United States District Court,
D. New Jersey.

Nov. 7, 1985.
As Amended Nov. 13, 1985.

State prisoners convicted of murder petitioned for habeas corpus. The District Court, Sarokin, J., held that: (1) state violated due process rights of prisoners by improperly appealing to racial prejudice during their trial by arguing that killings were motivated by racial revenge, and (2) state violated requirements of *Brady* rule by failing to disclose results of lie detector test given by state to eyewitness.

Writ granted.

Leon Friedman, Hofstra University Law School, Hempstead, Grover G. Hankins, Charles E. Carter, N.A.A.C.P., Brooklyn, N.Y., J. Cassidy, Cassidy Despo & Foss, Red Bank, N.J., for petitioners Carter and Artis.

Myron Beldock, Edward S. Graves, Beldock Levine & Hoffman, New York City, Ronald J. Busch, Busch, Busch & Busch, New Brunswick, N.J., for petitioner Carter.

Lewis M. Steel, Steel & Bellman, P.C., New York City, Louis Raveson, Rutgers School of Law, Newark, N.J., for petitioner Artis.

John P. Goceljak, First Asst. Pros., Joseph A. Falcone, Passaic County Prosecutor, Paterson, N.J., for respondent.

OPINION

SAROKIN, District Judge.

INTRODUCTION

The court is called upon in this matter to issue the "Great Writ," long recognized as "the best and only sufficient defense of personal freedom."[1] The petitioners, convicted of a triple murder that took place nearly 20 years ago, continue to protest their innocence and allege that serious violations of their constitutional rights occurred at trial. The court's responsibility to examine these allegations is in no way diminished by the existence of extensive review by the learned state courts which have ruled in this case. Indeed, it is tempting to presume the correctness of those rulings, but this court is charged to resist such temptation lest it fail in its duty to independently analyze the constitutional violations asserted in the petitions for

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[1] *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95, 19 L.Ed. 332 (1868) (Chase, C.J.)

habeas corpus relief. In so doing, the court has determined that the writ must issue. The extensive record clearly demonstrates that petitioner's convictions were predicated upon an appeal to racism rather than reason, and concealment rather than disclosure.

The jury was permitted to draw inferences of guilt based solely upon the race of the petitioners, but yet was denied information which may have supported their claims of innocence. To permit convictions to stand which have as their foundation appeals to racial prejudice and the withholding of evidence critical to the defense, is to commit a violation of the Constitution as heinous as the crimes for which these petitioners were tried and convicted.

Were it not for these grave constitutional violations, the court concludes, for the reasons hereafter set forth, the guilty verdicts of the jury might well have been otherwise.

BACKGROUND

At approximately 2:30 a.m. on June 17, 1966, two armed black men entered the Lafayette Bar & Grill in Paterson, New Jersey and opened fire. The bartender, James Oliver and a patron, Fred Nauyaks, were killed immediately. A second patron, Hazel Tanis, died one month later from her wounds and a third, William Marins, was partially blinded after being shot in the head.

Arrested four months later for the murders were Rubin Carter, a well-known professional boxer who lived in Paterson, and who was, at 30 years old, reaching the peak of his career, a contender for the middleweight crown; and 20 year-old John Artis, who was about to enter college on a scholarship.

As the case took a tortuous and often circuitous route through the New Jersey courts, the circumstances surrounding the killings and subsequent prosecution of Carter and Artis have become a mosaic. The picture of the evi-

dence painted by petitioners and respondents is often conflicting and sometimes exceptionally murky. The accounts of many important witnesses, especially that of Alfred Bello, the only "eyewitness" to testify at the 1976 trial, have changed; some witnesses have died; the memories of those who survive have grown hazy. But from thousands of pages of testimony spanning two trials and numerous hearings, the parties have reconstructed two drastically different versions of the events that tragic night. The conflicting evidence is reviewed below (See The *Brady* violation) but a brief summary of the evidence introduced at the second trial is presented here.

Patricia Valentine lived above the tavern and was awakened by gunshots about 2:30 a.m. She first ran to her window and saw two men leave the scene in a white car, then ran downstairs to the bar. Alfred Bello and Arthur Bradley were in the process of breaking into a nearby factory. Bello, who was standing lookout, was either in or outside of the bar (a main point of contention). Within minutes, police arrived at the scene and took statements from Bello, Marins and Valentine. A description of the car was sent out on police radio. A few minutes later, a Paterson police officer who just given up a brief chase of two cars, one white and one black, speeding out of town, started driving back into Paterson. He stopped a white car leased by Carter about 14 blocks away from the Lafayette Bar. Artis was driving, John Royster was sitting in the front seat, and Carter was alone in the back seat. The car was not speeding and there were no weapons in sight. Carter told the officer that the men were driving to his home, about six blocks away, to obtain money, and the car was allowed to go. Fifteen minutes later, Carter's car was observed outside the La Petite Bar about 10 blocks west of the Lafayette. About five minutes later, the car was sighted for a third time, with only Carter and Artis in the vehicle. This time the police escorted the car and its occupants to the crime scene.

From the evidence, it appears neither Bello nor Valentine identified the petitioners at the scene, and there is considerable dispute as to the identification of the car at the scene and again later that evening at the police station. The petitioners were taken to the station and to the hospital where the two survivors did not identify them. The petitioners were questioned, given polygraph examinations and released about 7 p.m. on June 17.

Meanwhile, police searched the car in which they later alleged that they found a live .12 gauge shotgun shell in the trunk and a live .32 caliber shell on the floor of the front seat. There was considerable dispute about this evidence.

The petitioners voluntarily testified before a Passaic County Grand Jury which did not return any indictments. In July and October, Bello told a Paterson police officer that he had seen Carter and Artis at the crime scene. Bello and Bradley identified Carter as one of the two black men they saw coming from the Lafayette Bar with weapons in their hands. Bello, but not Bradley, identified Artis as the second man. On the basis of these identifications, the petitioners were indicted and ultimately convicted of murder in June of 1967.

In late 1973, Fred Hogan, a state Public Defender's Office investigator assigned to Carter's case began contacting Bello and Bradley about the case. Hogan had communicated with Richard Solomon, a documentary filmmaker, Selwyn Raab, who then worked for a New York television station, and Hal Levinson, who worked for Raab at the station. Raab and Levinson eventually talked with Bello about recanting his testimony. After Bradley gave Hogan a statement recanting his identification of Carter, Hogan continued to talk with Bello, who in a written statement from jail in September 1974 first recanted his 1966

testimony (37T125)[2]. The recantation resulted in a hearing and began a series of events that ultimately set the stage for the second trial in 1976.

At the retrial, there was considerable testimony concerning alleged inducements made to Bello by both the prosecution and the defense camp in order to change his story. (See: The *Brady* Violation, *infra*) There was also evidence presented, and disputed by the defense, that Carter attempted to create a false alibi for the 1967 trial. (See: The *Brady* Violation, *infra*)The petitioners were both found guilty of first degree murder. Carter was sentenced to two consecutive and one concurrent life sentences and remains in prison. Artis, who received a lesser sentence, was released on parole for a ten year term beginning December 22, 1981.

PROCEDURAL HISTORY

The petitioners were originally tried and convicted in 1967 of three counts of first degree murder. Life sentences were imposed after a jury recommendation of mercy on June 29, 1967. The convictions were affirmed on direct appeal to the New Jersey Supreme Court. *State v. Carter,* 54 N.J. 436, 255 A.2d 746 (1969) (*"Carter I"*), *cert. denied,* 397 U.S. 948, 90 S.Ct. 969, 25 L.Ed.2d 130 (1970).

On October 1, 1974, the petitioners filed a new trial motion based on the statements of the state's two key witnesses recanting their 1967 identification testimony. The original trial judge denied the motion. *State v. Carter,* 136 N.J.Super. 271, 345 A.2d 808 (Cty. Ct. 1974). A second new trial motion was made on January 30, 1975 and that motion was also denied. *State v. Carter,* 136 N.J.Super.

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[2] Indicates reference to volume and page number of transcript from 1976 trial. A date plus "H" and a page number, i.e., 5/19/81H131, connotes transcript date and page number from the trial court's 1981 hearing on remand. PB refers to Petitioners' brief. RB refers to Respondent's brief. PRB refers to Petitioners' reply brief.

596, 347 A.2d 383 (Cty. Ct. 1975). That decision was appealed to the New Jersey Supreme Court, which, on March 17, 1976 overturned the convictions and ordered a new trial. *State v. Carter,* 69 N.J. 420, 354 A.2d 627 (1976) (*"Carter II"*). The Supreme Court ruled that the prosecution had withheld from the defense exculpatory evidence which demonstrated that prosecutors had offered the key identification witnesses protection and help with criminal charges pending and/or threatened against them.

The case was remanded to the trial court, where there were numerous motions and hearings. The retrial began on October 12, 1976 and concluded on December 22, 1976 when the jury returned first degree murder verdicts. The judgments were appealed to the Appellate Division of New Jersey Superior Court and the state Supreme Court. During the pendency of these appeals, there was a federal habeas corpus order for a state court hearing on allegations of juror misconduct. These hearings were held in 1979 by the second trial judge, who found against the defense on all issues.

Among the new trial motions pending before the New Jersey appellate courts was a motion seeking an evidentiary hearing to determine whether the prosecution had misrepresented the results of a 1976 pretrial polygraph test given to Alfred Bello. (See: The *Brady* Violation, *infra*) The Appellate Division affirmed the convictions in an unreported opinion issued October 22, 1979. The New Jersey Supreme Court reversed, however, remanding the issue to the trial court for a hearing on issues surrounding the polygraph test. *State v. Carter,* 85 N.J. 300, 426 A.2d 501 (1981) (*"Carter III"*).

The remand hearing before the trial judge lasted 15 days. In an 80-page unreported opinion dated August 28, 1981 ("Opinion on Remand"), the judge found against the defense on all issues. One year later, following further briefing and oral argument, the New Jersey Supreme Court

affirmed the convictions by a 4-3 majority. *State v. Carter*, 91 N.J. 86, 449 A.2d 1280 (1982) (*"Carter IV"*).

Subsequently, petitioners filed another application before the trial court for an evidentiary hearing relating to allegedly exculpatory material contained in the file of a former prosecution investigator. That application was denied and appealed to the Appellate Division, which affirmed the trial court in an unreported decision dated July 2, 1985.

THE HABEAS CORPUS PETITIONS

The instant petitions for habeas corpus were filed February 13, 1985 by Carter and February 28, 1985 by Artis. The actions were consolidated in an order dated May 6, 1985. A motion for summary judgment on seven of the petition's twelve grounds was filed by petitioners on May 25, 1985 and oral argument on the motion was held July 22, 1985, after which the court received further submissions from counsel.

The petitioners allege:

1. The state violated the requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by failing to disclose the results of a lie detector test given to the state's only "eyewitness".

2. The state violated the Equal Protection and Due Process rights of petitioners by improperly appealing to racial prejudice during the trial by claiming the killings were motivated by racial revenge.

3. The jury considered material not introduced as evidence and members of the jury had preexisting racial prejudice.

4. The prosecution misled the defense as to its theory of the case, withheld discovery, improperly cross-examined and unfairly denigrated defense witnesses.

5. The prosecution violated the Due Process rights of petitioners by exerting improper pressure on certain witnesses to support a false alibi claim.

6. The prosecution violated the Due Process rights of petitioners by using Bello as a witness despite proof of his "monumental" untrustworthiness.

7. The prosecution withheld a memorandum in violation of *Brady* showing how Bello was persuaded to change his mind.

8. The prosecution violated the petitioners' rights to a Speedy Trial by making last-minute presentations at trial of a new theory.

9. The evidence presented at trial did not meet the reasonable doubt standard.

10. The petitioners' Due Process rights were violated because public funds were not made available for investigative and expert services and because the trial judge did not properly exercise judicial discretion to limit cross examination regarding Carter's criminal record.

11. The petition's Due Process rights were violated by the trial judge's bias.

12. The state committed a *Brady* violation by failing to produce a file by a former investigator in the case.

Petitioners seek summary judgment on Grounds 1, 2, 4, 6, 7, 8 and 10.

During oral argument, counsel for Petitioner Carter represented that the complaint would be amended to exclude Ground 12, the identical issue rejected by the Appellate Division on July 2, 1985, so that there would be no dispute that he had presented only exhausted claims to his petition. Respondents agreed to the amendment of the complaint.

Petitioner Artis has not amended his petition to delete Ground 12, and argues that technical exhaustion of his

state remedies is unnecessary because the corrective process in the New Jersey state courts is so clearly deficient as to render futile any efforts to obtain relief. That issue is discussed below. (See: Exhaustion of State Remedies, *infra*).

THE RACIAL REVENGE THEORY

A. The State's Arguments

The court first turns to Ground 2, that the petitioners' Due Process rights were violated. During the 1967 trial, the defense argued that the state had not established any reason or motive for Carter and Artis to have committed the murders. Anticipating the same tactic at the 1976 retrial, the state contended the shotgun murder of James Oliver, a white bartender at the Lafayette Bar, was motivated by racial revenge. The state theorized that the other three bar patrons were shot only because they had witnessed Oliver's killing, and that there was no robbery, because their money was scattered about the bar after the rampage. (16T44, 19T174, 32T167–171).

The genesis for the state's theory began about six hours before the Lafayette Bar killings, when Leroy Holloway, the black owner of the Waltz Inn, another Paterson tavern, was shot and killed by Frank Conforti, a white man who had previously owned the Waltz Inn. The state introduced testimony from police officers that a large and "angry" crowd gathered outside the Waltz Inn shortly after the shooting. (32T194, 31T136–141) Within the next few hours, according to the Grand Jury testimony of Rubin Carter himself, there was talk of a "shaking" or some sort of retaliatory action among the black community. (36T153–154)

In order to tie the two killings together, the state argued that the Lafayette Bar had served primarily white patrons and was an ideal target of this anger. (31T69–71) It was located on the fringes of a black neighborhood and

Oliver, its bartender, had on occasion refused to serve black customers, according to the testimony of one officer. (17T75–80) The state alleged that Carter and Artis were both aware of the murder of Holloway and the ensuing tense atmosphere in the streets, and that they were driven to action out of their friendship with Edward Rawls, Holloway's stepson and a part-time bartender at the Nite Spot, a Paterson bar frequented by Carter. (39T257–258) After he learned of the Waltz Inn shooting, Rawls took the night off from his job at the Nite Spot and went to the hospital where his stepfather had been taken, then to police headquarters, where, according to police officers' later testimony, Rawls demanded to know what the "police intended to do about the guy who killed his stepfather." One of the same officers testified that Rawls became agitated and was ordered to leave. (33T5–8) Afterwards, Rawls met Carter at the Nite Spot, where Carter extended his condolences. The state asserts that Carter then set out to search for weapons stolen from his training camp a year earlier, found the guns and committed the murders. (36T136–149).

B. Proper Use of Motive

At trial, the defense objected strenuously to the introduction of the racial revenge motive, on the grounds that such evidence would be prejudicial and that its probative value was outweighed by its prejudicial effect (31T120). The trial judge, relying on *State v. Rogers,* 19 N.J. 218, 116 A.2d 37 (1955), ruled that in criminal prosecutions, wherein the motive is important and material, a somewhat wider range of evidence is permitted. (31T121). In *Rogers,* the court allowed evidence showing loans made by a murder victim to the defendant were never repaid. Similarly, the *Carter* trial judge held that the proffer of motive was material and probative and had a tendency to explain conduct which would ordinarily or otherwise probably be unexplainable. (31T122). The New Jersey Supreme Court agreed, citing *Rogers* and its progeny, and ruled that

"There is nothing inherently wrong with advancing a theory of revenge as a motive for murder, if the facts bear out the theory." *Carter IV*, 91 N.J. at 106, 449 A.2d 1280.

It is well-established that the prosecution may introduce evidence of motive. *Carter IV*, at 102, 449 A.2d 1280, 1 Wigmore and Tillers, *Evidence* § 118, at 1697–98 (1983). "Motive cannot be shown directly, but may be inferred from facts in evidence. In the introduction of evidence to show motive, a wide range is permitted. Thus, any evidence which logically tends to show a motive, or fairly tends to explain the conduct of the accused should be permitted" 1 Wharton, *Criminal Evidence*, § 170 at 317–318 (13th ed. 1972). In *State v. Rogers, supra*, the court allowed the prosecution to introduce evidence to show the defendant had been indebted to the murder victim. The New Jersey courts have continued to follow *Rogers*, as have other courts throughout the country. For instance, in *State v. Baldwin*, 47 N.J. 379, 391, 221 A.2d 199 (1966), *cert. denied*, 385 U.S. 980, 87 S.Ct. 527, 17 L.Ed.2d 442 (1966), the court allowed evidence that the defendant's victim was a prospective witness; in *State v. Royster*, 57 N.J. 472, 484–485, 273 A.2d 574 (1971), the court allowed evidence showing the defendant threatened the victim several weeks before the murder, in *United States v. Parker*, 549 F.2d 1217 (9th Cir. 1977), *cert. denied*, 430 U.S. 971, 97 S.Ct. 1659, 52 L.Ed.2d 365 (1977), the court upheld the introduction of evidence of narcotics dealing as motive to commit a robbery; and in *United States v. Michaels*, 726 F.2d 1307 (8th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984), the court allowed evidence of the car bombing death of the defendant's grandfather as motive for a subsequent bombing.

C. The New Jersey Supreme Court's Analysis

The New Jersey Supreme Court majority accepted the racial revenge theory as probative, dismissing the petitioner's claims that irrespective of its relevance, the

impact of the evidence involving motive was inflammatory and improperly swayed the jury. The decision, the court said, was within the discretion of the trial judge, and absent abuse of discretion or a manifest denial of justice, should not be disturbed. *Carter IV,* 91 N.J. at 106–107, 449 A.2d 1280. "Ordinarily, evidence as to motive is admissible even though it may be prejudicial in the sense that it will arouse or inflame the jury." 1 Wharton, *Criminal Evidence,* supra, § 170, at 316. This case is, however, far from an ordinary introduction of motive. The court must be especially sensitive to the introduction of motive with racial connotations. When a court is dealing with narcotics use as motive for robbery, or a previous direct threat by a defendant against a victim as an indication of ill-will and motive, then there is a clear relationship between the defendant and the motive. There is no such relationship here.

The New Jersey Supreme Court also rejected petitioner's claims that the interjection of the racial revenge motive, and the state's summation of that motive, was an unacceptable appeal to racial prejudice, and as such violated their due process rights to a fair trial.[3] *Carter IV,* at 107, 449 A.2d 1280. The summation read, in part:

> PROSECUTOR: Strand Number Five: Motive. Defense counsel say that is a sensitive issue and it is. It's a very sensitive issue. None of us like to admit that things like race prejudice and anger and hate for people because of the different color of their skin exists in this world. We avoid it. We teach our children the contrary. We support civil rights. We support courses in our schools. We bear in mind the words of Reverend King, in which he had a dream

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[3] The New Jersey Supreme Court ruled that the summation constituted proper comment, and the petitioners had not established a case of plain error, the applicable standard for such a review by that court. *Carter IV,* at 107, 449 A.2d 1280.

of a day where people would judge his children by the quality of their character, not by the color of their skin. Now ladies and gentlemen, we don't live in that world yet and we certainly didn't live in that world in 1966. It was a world and is a world filled with people who hate. You may remember in the voir dire a number of questions were asked of you about racial prejudice. We wanted a jury which is free from racial prejudice. But, we recognized in making those questions that not everybody is free from racial prejudice and, of course, *we know that no group, no class is immune from hate and we know that revenge is one of the most powerful motives that any human being can have. We look around the globe and see it everywhere. We see Greeks and Turks and . . .*

COUNSEL FOR ARTIS: Your Honor, I object to Greeks and Turks and things outside this courtroom.

THE COURT: No. Counsel is making a point. He is illustrating a point by describing as other counsel did. I will permit that.

PROSECUTOR: *We see hate and anger and revenge there and we see people in Ireland fighting because of religion* and we know that in 1966 there were many blacks with legitimate grievances and some blacks and some whites did not act as law-abiding citizens. It's an area which everybody goes into with a great deal of trepidation, but does it mean we should hide, look away; we should say, well these motives are too repulsive, too ugly, we don't want to deal with them. We have to look at them. We have to analyze them. And I suggest to you, as much as you may want to look away, as much as you may want to say it couldn't have happened for that reason, it did happen for that reason. *What other reason could it have happened for?*

(45T198–200) (emphasis added)

D. Analysis of the State's Evidence

The spoken question begets the unspoken question: "What reason other than the defendants being black and the bartender white?" Even assuming, *arguendo*, that the government's version of events purporting to evince racial motive was supported by the evidence, the court concludes that the evidence submitted was insufficient to justify injection of such a contention.[4] In essence, the prosecution was permitted to argue to the jury that defendants who were black were motivated to murder total strangers solely because they were white. Although racial revenge may indeed be a motive for murder, its highly inflammatory and prejudicial effect upon a jury requires that its existence be supported by sufficient and competent evidence. Furthermore, that evidence must be attributable and relevant to the defendants on trial and not based upon a stereotyped supposition as to how a particular group would react in a given situation. Therefore, in analyzing the facts in this case it is essential to distinguish the acts and knowledge of the defendants from those of other persons or groups of persons.

The prosecution, in support of its "racial revenge motive" relied upon what it has termed "twenty points" of evidence. (31T55-77) Of those points, only the following pertained directly to petitioners on the issue of motive:

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[4] The state argues that even if there were minimal prejudicial impact, it was somehow blunted by the great pains taken by the court to minimize jury prejudice through extensive *voir dire* of the racial attitudes of potential jurors (thereby forewarning the jury that sensitive racial issues would be coming before it). (RB at 124). Even a careful *voir dire* cannot ensure that in the context of a long and complex trial jurors will not succumb to an appeal based on racial prejudice. Petitioners allege, for example, that the prosecutor's seemingly unrelated reference to the Irish and Greeks may have been appeals to two jurors who immigrated to the United States from those countries. (PB at 109)

1. Petitioners knew of the murder of Holloway, a black man.

2. Petitioners were friends of Edward Rawls, Holloway's stepson.

3. Carter extended his condolences to Rawls prior to the murders at the Lafayette Bar.

4. Carter testified before the grand jury that there was talk that night in the black community of a possible "shaking" (i.e. rock and bottle throwing).

The balance of the purported evidence as to racial revenge might support the prosecutor's theory in general as to motive, but had little relationship to the petitioners. Indeed, it is difficult to fathom some of its admissibility as against them. For instance:

1. *The three other Lafayette Bar patrons were shot only because they were witnesses to the killing of Oliver; there was no evidence of robbery.* At best this evidence is consistent with the prosecutor's theory but adds nothing to implicate the petitioners.

2. *There was a large and angry crowd gathered outside the Waltz Inn shortly after the shooting.* It is difficult to understand how such a gathering could be imputed to petitioners. There is no evidence that they were present or even knew of such a gathering.

3. *The Lafayette Bar had primarily white patrons and was an ideal target of the anger of the black community.* Again there is no evidence that petitioners had any knowledge of the purported history of the Lafayette Bar or ever expressed any animosity towards it.

4. *Rawls went to police headquarters and demanded action, became agitated and was ordered to leave.* There is no testimony that petitioners knew or learned of this incident, and again it is difficult to comprehend how such activities could have been considered in assessing their motives.

If these and the other factors unrelated to petitioners are deleted from the government's equation, as this court concludes they should have been, what remains is simply the following: A white man killed a black man. Petitioners were friends of the stepson of the victim and expressed their condolences. They *heard* there might be a "shaking." *Ergo*—they set out to murder four strangers solely because they were white as an act of revenge, and notwithstanding that one of the alleged murderers was well known in the community and easily recognizable.

Underlying the prosecutor's theory and summation is the insidious and repugnant argument that this heinous crime is to be understood and explained solely because the petitioners are black and the victims are white. Without that unacceptable assumption, the prosecution's theory of racial revenge becomes a thin thread (rather than the rope referred to in the prosecutor's summation) of largely irrelevant evidence and impermissible inferences.

The foregoing analysis is predicated upon a view of the prosecution's case in its most favorable light and accepting as true and proven each element of the prosecution's racial revenge theory. While this in itself would constitute sufficient grounds for granting the writ, the court is even further convinced of the correctness of its conclusion by the significant contradictory evidence which permeates the record on this issue. While this conflicting evidence as to motive is not in itself a constitutional infirmity, its presence further undermines the validity of its submission to the jury. For example, the motive in the Waltz Inn killing was a dispute over money, having nothing to do with race (33T120). While there was testimony at trial by two police officers that there was a crowd of 25 to 30 "unruly and angry" people outside the Waltz Inn, the atmosphere among the crowd was contradicted by another witness, Clarence Carr, who testified that while the group, which included whites, was upset, there were no racially derogatory terms used by the crowd, nor was anyone urging

mob retribution on Conforti as he was brought through the crowd by police (41T18–19). Similarly, just as two police officers testified that Rawls appeared at police headquarters and promised vigilante action if the police did not bring his stepfather's killer to justice, another witness, William Johnson, said that Rawls made no threats or disturbance, but was simply making an inquiry. (34T31).

The testimony concerning the racial composition of the bars; that the Lafayette Bar was "white" and that Oliver, the bartender, refused to serve blacks, was vital to the question of motive. However, the police officer who testified that he had been called to the bar on more than one occasion when Oliver refused to serve blacks also testified that he had seen blacks being served at the Lafayette Bar. (17T81) Another witness, Ronald Ruggerio, a white man who lived a few doors down from the bar, testified that he had seen blacks from the neighborhood patronizing the bar and had seen Oliver serving them. (40T130,131)

The state assets that the lynchpin of its racial revenge theory came from Carter himself, when he testified before the Grand Jury in 1966. Carter testified that there was talk among the black community of a "shaking", which he said meant to include rock and bottle throwing, but not murder (36T154). The state took Carter's definition further, implying that he meant murder, and stating in its summation that the only reason Carter mentioned the talk of "shaking" to the Grand Jury was that he knew the police were aware of it. (45T203) There was no evidence to support this, however.[5]

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[5] What the state did offer was a transcript of an October 11, 1966 interview with its key witness, Alfred Bello, in which Bello suggested that revenge was the motive. (21T59–61) Bello also testified that he had heard one of the wounded Lafayette Bar patrons say that there had been robbery (22T30). The only other evidence offered indicating police knowledge of a racial revenge motive was the testimony of a Paterson police detective who testified under cross-examination that he

Most significantly, there was no direct evidence ascribed to the petitioners to support the racial revenge motive. While Carter and Artis were shown to have known Rawls, and Carter conceded in his grand jury testimony meeting briefly with him at least one time that night to express his condolences, there was no evidence that either petitioner knew that it was a white man who killed Holloway, or, had they known, that they would have reacted in such a vicious and violent manner. There was evidence that the petitioners had cordial relationships with white people, socially and professionally, and that Carter lived in an integrated neighborhood and trained at an integrated gym. (39T135–136) Several white character witnesses testified on Artis' behalf. (43T113, 116, 118)

The petitioner's knowledge of a mob gathering or even threatened retaliation cannot be imputed to them unless they did more than know about it. Are the actions of a mob imputed to members of a particular race just because they witnessed or learned of the actions of such a mob? If defendants had learned of mobs, or threats, or talk of a "shaking" or retaliation from news reports rather than on the streets could such knowledge alone be used against them? Even assuming that petitioners had learned there was to be an indiscriminate killing of whites, how can such knowledge provide a basis for establishing their personal motives?

The final element of the state's theory was Carter's "search" for weapons.[6] The prosecutor argued that Carter, swept up in the talk of a "shaking," went with his friends, including Neil Morrison, to the apartment of another friend, Annabelle Chandler, to confront her about a story she had

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was present during the funeral of Holloway in his capacity as an investigator in the Lafayette Bar murders.

[6] This theory was prohibited at a 1967 pretrial *Miranda* hearing, the court ruling its prejudicial value outweighed its probative effect. The ruling was reversed for the 1976 trial (PRB at 39, n. 1)

told Carter about Morrison allegedly stealing guns from Carter's training camp a year earlier. (36T164) The state maintained that Carter somehow then found the guns, and after several meetings with Rawls, took part in the killings. The meeting at Mrs. Chandler's apartment was confirmed in the record, but Carter did not press the matter, because Mrs. Chandler was seriously ill. (36T146–148; 39T96) There is no testimony that Carter obtained the weapons at the apartment. But the links of this evidentiary chain are corroded. There was no evidence that Carter found the weapons. There was no evidence that Carter's conversation with Rawls went beyond a simple condolence, yet the prosecution inferred private meeting with Rawls, during which, presumably, the killings were planned. Further, there was testimony that the decision to go to Mrs. Chandler's apartment was made before anyone had heard about the shooting, because of Carter's chance meeting with Morrison, who was the former manager of Carter's training camp and who had recently been released from jail. (36T136) After the meeting at Mrs. Chandler's apartment, Carter and his party returned to the Nite Spot, where they had been drinking before. (39T285–286)

Even accepting the facts relied upon by the state and all reasonable inferences therefrom, the court concludes the "search for weapons" scenerio lends no support to the state's racial revenge theory. The alleged search for guns is no more probative of the petitioner's motive than the murders themselves. Motive answers the question: "Why?" To argue that the search for guns is evidence of motive begs the question, particularly where it appears that the "search" may have occurred even before petitioners knew of the shooting of Leroy Holloway (36T140–145).

Certainly motives can be derived from actions, but to suggest that searching for guns, finding them and then using them, is evidence of motive is to elevate a bootstrap argument beyond all reason. Evidence that petitioners looked for weapons to carry out their racial revenge is

probative of their guilt but it cannot also serve as evidence of their motive in seeking the guns. Indeed, if there was truly support for the prosecutor's theory, then the motive would have been formed when the alleged search for weapons began. The fact of the search adds nothing to the evidence of motive.

E. The State's "Assumptions"

The petitioners allege that the state's theories rest on three "unacceptable and insupportable" assumptions, one articulated and two unarticulated. (Petitioner's brief p. 102). The articulated assumption was that a "shaking" meant a violent, murderous response by members of the black community. As the prosecutor said in his summation:

> A few hours before 8:00, I believe, a man at the Waltz Inn was killed. *A white man came in and blew his head off with a shotgun and some four or five or six hours later two black men came into a bar and put a gaping hole with a shotgun into the white bartender. Coincidence? We like to think so, but the facts don't add up to a coincidence.* They don't add up to a coincidence at all. A shotgun used, the same type of weapon; a bar on the border between a black area and a white area; a bartender who Officer Unger—and this was his beat, remember—testified that there had been complaints regarding the bartender refusing to serve black persons. What a natural target, and of course, there is Mr. Carter's testimony before the Grand Jury which was read to you. There was talk of a shake among certain persons in the black community. There was talk of a retaliation.

(45T201–202) (emphasis added)

The first unarticulated assumption, the petitioners argue, is that blacks in general, and Carter and Artis in particular, would have such hostile attitudes toward whites and such a predilection toward violence that they would be likely to respond by indiscriminately killing three whites

whom they never knew to avenge the death of a black man they had never met. The second unarticulated assumption is that Rawls was a necessary co-conspirator, and the prosecutor's theory was based on a series of conjectures which required the jury, in effect, to try and convict Rawls, who was never indicted or brought into court. The inferential leaps made by the prosecutor are virtually impossible without the unstated appeal to the jury that it is perfectly reasonable to expect blacks to commit murder when one of their own is attacked. The fallacious premise of the argument becomes self evident if it is reversed and applied toward whites. Would a jury be permitted to conclude that a white defendant would have expressed such violent and indiscriminate rage without any evidence of personal racial animosity?

The evidence did not support the imputation of the racial revenge motive to Carter and Artis. There was no proof that Carter and Artis were black militants with an inclination to kill whites, nor that they had even the slightest hostility toward whites, only that Carter had heard there was unrest and heard there was talk of a possible disturbance. In fact, the only blatantly racial statement placed before the trial court was Bello's testimony that while he was being interviewed by a prosecutor's detective in October 1966, that detective referred to blacks as "niggers" and "animals." (21T14)

Moreover, the prosecutor acknowledged the necessity to establish the showing of personal hostility in a letter to the trial court judge on November 26, 1976:

> Wigmore (3rd ed. 1940 § 118) says that the showing of motive is a two-step evidential process. The first step is showing that a particular emotion is a circumstance showing the probability of appropriate ensuing action. Hence, a showing of the hostility of the defendant toward the race of the victim should be a

> circumstance which makes the desired inference (i.e. the defendant killed the victim) more probable.

Defendants' Joint Appendix on Appeal of Convictions, Volume 4, p. 22(a).

During oral argument, the state conceded that there was no direct evidence to support the motive other than Carter's "shaking" reference before the initial grand jury (Transcript of Oral argument July 26, 1985, p. 71). The state's answer to this lack of direct evidence is that "actions speak louder than words"; that if the jury were to find that Carter was the individual who committed the killings, they could then attribute the motive to him. *Id.*, at 70. This argument is convoluted and contrary to the prosecutor's own arguments that the jury should use the existence of motive to find that defendants had committed the killings.

F. The Standard of Review

In reviewing the conduct of a state prosecutor in a petition for writ of habeas corpus, this court is limited to the narrow scope of due process violations. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974). Only those state trial court errors that constitute a "failure to observe that fundamental fairness essential to the very concept of justice," violates due process. *Lisenba v. California,* 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941), *reh'g denied,* 315 U.S. 826, 62 S.Ct. 620, 86 L.Ed. 1222 (1942) ("In order to declare a denial of [due process] we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Id.*) In federal habeas corpus reviews of state proceedings, it is essential to distinguish between ordinary trial error and that sort of egregious misconduct which amounts to a denial of constitutional due process. *United States ex rel. Perry v Mulligan,* 544 F.2d 674, 678 (3d Cir. 1976), *cert. denied,* 430 U.S. 972, 97 S.Ct. 1659, 52

L.Ed.2d 365 (1977). Several circuits have said that a prosecutor's appeal to racial prejudice can rise to an infirmity of that magnitude. *See: Miller v. North Carolina,* 583 F.2d 701 (4th Cir. 1978); *Kelly v. Stone,* 514 F.2d 18 (9th Cir. 1975); *United States ex. rel. Haynes v. McKendrick,* 481 F.2d 152 (2d Cir. 1973); and *Soap v. Carter,* 632 F.2d 872, 877 (10th Cir. 1980) (Seymour, J. dissenting), *cert. denied,* 451 U.S. 939, 101 S.Ct. 2021, 68 L.Ed.2d 327 (1981). "Appeals to racial prejudice are foul blows and the courts of this country reject them." *Withers v. U.S.,* 602 F.2d 124; *Ross v. United States,* 180 F.2d 160 (6th Cir. 1950), *cert. denied* 344 U.S. 832, 73 S.Ct.46, 97 L.Ed. 648 (1952).

The essence of an improper appeal to the jurors is that it is directed to passion or prejudice rather than an understanding of the facts and the law. *Perry v. Mulligan,* at 680. Such appeals to passion or prejudice threaten the impartiality of the jury, a fundamental component of a fair trial. An effective appeal to prejudice undermines the guarantee that a defendant shall have his case decided according to evidence in the record, rather than on the basis of potential juror bias. Moreover, prejudicial argument by the prosecutor unfairly stacks the deck in the government's favor. *Soap v. Carter,* 632 F.2d at 877 (Seymour, J. dissenting).

In *Haynes,* the Second Circuit reviewed a district court judge's issuance of a writ of habeas corpus on the grounds that the prosecution's use of racially prejudicial remarks in summation violated the petitioner's right to a fair trial. The remarks were more overt than in the instant case, but no less impressionable. The prosecutor in that case made repeated references to "colored people" as an entity separate and apart from the jury. Such "racial prejudice can violently affect a juror's impartiality and must be removed from the courtroom proceeding to the fullest extent possible." *Id.,* at 157. Judge Oakes, in his opinion, traced the Supreme Court's fair trial cases, beginning with *Moore v. Dempsey,* 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923)

where the Court had overturned convictions on Fourteenth Amendment grounds when racial prejudice "was a major factor in the fiber of the trial." He similarly traced the equal protection cases, beginning with *Strauder v. West Virginia,* 100 U.S. 303 [10 Otto 303, 25 L.Ed. 664] (1879) and noted there is a point where a criminal trial is affected by racial prejudice, either in the underlying procedure or the atmosphere surrounding the trial, when an overlap of the due process and equal protection clauses could occur. "If there is anything more antithetical to the purposes of the Fourteenth Amendment than the injection against a black man of racial prejudice . . . we do not know what it is." *Id.,* at 159. Judge Oakes concluded that there was a strong probability of prejudice in the prosecutor's remarks, and defined that "probability" as the correct test "when the evidence of guilt is not overwhelming." *Id.*

In *Miller,* three black men convicted of raping a white woman petitioned for habeas corpus, arguing, *inter alia,* that racially inflammatory remarks in the prosecutor's closing argument were so prejudicial as to make a fair trial impossible. Again, the remarks were overt: that the victim could not have consented to sexual relations because "the average white woman abhors anything of this type in nature that had to do with a black man," *Miller,* at 704. The court said that where evidence is relevant but also prejudicial, the law requires that it not be received into evidence until it has been demonstrated that its relevance and probative value outweighs its collateral prejudicial effect. *Id.,* at 706. "A prejudicial argument by the prosecutor poses a serious threat to a fair trial. Not only does it undermine the jury's impartiality, but it also disregards the prosecutor's responsibility as a public officer." *Berger v. United States,* 295 U.S. 78, 85, 55 S.Ct. 629, 632, 79 L.Ed. 1314 (1935). *See also:* American Bar Association Project on Standards for Criminal Justice, The Prosecution Function, § 5-8(c) (1974) ("The prosecutor should not use

arguments calculated to inflame the passions or prejudices of the jury.")

In *McFarland v. Smith,* 611 F.2d 414 (2d Cir. 1979), a prosecutor asked the jury to credit a black police officer's testimony because she was testifying against another black person. "To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." *Id.,* at 417. While the court added that not all race-conscious arguments are impermissible, it added a cautionary note:

> But given the general requirement that the race of a criminal defendant must not be the basis for any adverse inference, any reference to it by a prosecutor must be justified by a compelling state interest.

Id.

The New Jersey Supreme Court and the respondents in this action dismiss this entire line of cases as not on point, because, they maintain, the prosecutor's advocacy attributed no qualities to a generalized class of blacks. *Carter IV,* 91 N.J. at 108; 449 A.2d 1280. This court respectfully but vehemently disagrees. The evidence, so overwhelmingly circumstantial, requires, in many places, inference upon inference to support the state's theory. The only means by which the prosecutor's theory makes sense, in light of that evidence, is if the jury makes the prejudicial racial assumptions referred to above.

Moreover, in the context of the conflicting evidence and the extreme danger of prejudice, the remarks uttered in summation confirm the "unarticulated assumption" referred to by petitioners. The prosecutor, in analogizing the longstanding racial or ethnic wars abroad—and the accompanying television images of senseless violence—to the

depth of racial antipathy that existed in Paterson in June, 1966, without basis in the record, imputed the "powerful motive of revenge" on the entire black community, and thus on the petitioners. This despite the absence of any evidence of either petitioner having such racial hatred. In sum, the prosecutor's theory invokes race for a purpose that has very slight or uncertain logical validity, and does so at a distinct risk of stirring racially prejudiced attitudes. *McFarland v. Smith*, 611 F.2d at 419.

The court must next consider whether injection of the racial motive into the case was harmless error under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), *reh'g denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967). In *Chapman*, the Supreme Court stated that some constitutional errors are so unimportant and insignificant that they may, consistent with the Constitution, be deemed harmless, not requiring automatic reversal. "The question is whether there is a *reasonable possibility* that the evidence complained of might have contributed to the conviction," *Id.*, at 23, 87 S.Ct. at 827 (emphasis added). It is certainly arguable that an appeal to racial prejudice of the kind which occurred here violates that category of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Id.* Such cases include coerced confessions, denial of counsel or lack of an impartial judge. *Id.*, at n. 8. In *Miller v. North Carolina*, the Fourth Circuit applied this standard of automatic reversal where the prosecutor made a blatantly racist comment. But this court need not reach the issue of whether that absolute standard has been met here; the probability of prejudice was sufficiently great and the case sufficiently close that it was reasonably possible, indeed probable, that the theory of a racial revenge motive and its submission to the jury contributed to the conviction.

G. Conclusion—Racial Revenge Motive

To support this conclusion the court need look no further than the prosecutor's own argument to the trial court. In proffering the so-called "twenty points" of evidence to support the racial revenge motive, the prosecutor said:

> if the state does not attempt to prove motive in this case, the sate will be handicapped because these defendants will have every right to argue to the jury at the conclusion of the case that motiveless murders do not occur, that the state has not addressed any evidence of motive and for that reason these defendants did not do the crime for which they are charged.

(31T69)

Thus, the prosecution itself concedes that the racial revenge theory was essential to its procuring a conviction and without it, its case was in jeopardy. Certainly it should be estopped to now argue that it was not critical in the jury's determination of guilt.

Obviously, the death of the stepfather of the petitioners' friend, standing alone, would never explain why petitioners would shoot four innocent personas who were strangers to them. Notwithstanding the lack of any evidence that petitioners had a background of racial animosity against whites or had any such feelings after the specific death involved, the prosecutor was permitted to render the illogical logical, by relying upon petitioners' blackness and the victims' whiteness. Thus the jury was permitted to draw inferences based solely on the race of the petitioners and the victims.

An appeal to racial prejudice and bias must be deplored in any jury trial and certainly where charges of murder are involved. For the state to contend that an accused has the motive to commit murder solely because of his membership in a racial group is an argument which should

never be permitted to sway a jury or provide the basis of a conviction.

THE *BRADY* VIOLATION

A. The Harrelson Polygraph

As the 1976 retrial approached, the state faced the prospect of presenting its case without either of its crucial "eyewitnesses" from the 1967 trial. Arthur Dexter Bradley, who in 1967 had identified Carter as being present outside the Lafayette Grill, recanted his testimony in 1974. But more importantly, it appeared the state would not have Alfred Bello, the primary identification witness, who testified at the 1967 trial that he saw both Carter and Artis *with weapons, "on the street" outside of the tavern immediately after the killings.*

Bello began retreating from his original testimony in a 1974 recantation and he continued revising his story until it became unrecognizable. At a recantation hearing in October, 1974, he said he could not identify either Carter or Artis as being near the Lafayette Grill after the shootings. Bello told recantation versions of his story to newsman Raab and Levinson. In addition, during August 1975, Bello made a series of tape recordings with friends Melvin Ziem and Joseph Miller during which he told several additional versions of the events following the Lafayette Bar killings. On October 30, 1975, Bello said in an affidavit that he was *"in the bar" at the time of the shootings,* and that immediately afterward he ran outside, where he saw Carter and Artis. Bello said he did not remember seeing the petitioners in the bar and he did not believe they were the trigger men, but thought they were involved nevertheless. (20T175–178). In another affidavit the next day, Bello said that he did not see Carter and Artis with weapons *or* in the bar. (20T178). Bello told an Essex County grand jury seven weeks later that he saw two different black men in the bar, while he saw Carter and Artis out-

side. (Remand hearing 5/19/81 H79, 115-120). In June 1976, Bello told essentially the same story to the Passaic County prosecutor's office.

Understandably concerned, the state arranged for a polygraph examination by Professor Leonard H. Harrelson on August 7, 1976. The purpose of the examination, according to the then prosecutor, was to evaluate Bello's credibility, including "whether he was telling the truth or lying when he said he was in the bar at the time of the shooting," *Carter IV,* 91 N.J. at 133, 449 A.2d 1280. As a result of the polygraph, Harrelson concluded that Bello was telling the truth when he said he was *in the bar* shortly before and at the time of the shooting (5/19/81H79,131). He also concluded that Bello saw Carter and Artis outside of the bar after the shooting. *Id.* The same day, he gave an oral report of his findings to Passaic County Assistant Prosecutor Kayne and Chief of Detectives DeSimone. DeSimone told Harrelson that his conclusion was impossible; that Bello could not have been inside the bar at the time of the shooting. *Id.* Bello ultimately testified for several days at the 1976 trial, but the subject of the lie detector test was not brought out before the jury.

Harrelson testified at a post-trial remand hearing that he told the prosecutors his report was not tentative or preliminary and although he would not change his opinion, he would follow the verbal report up with a written "final" report. (5/19/H,31-134) On August 11, 1976, Harrelson gave the same verbal report by telephone, and two weeks later he sent his written report to the prosecutor. The confusion that ensued was aptly described by Justice Clifford in his incisive dissent to the opinion of the New Jersey Supreme Court:

> For reasons that can charitably be described as unfortunate, in his later written report of his test the polygraphist summarized his findings with the opinion

> that Bello's 1967 trial testimony (which contained the "on-the-street" version) was "true": unfortunate, because Harrelson had never read Bello's 1967 testimony and no representative of the prosecution had enlightened him as to that testimony and hence he was plainly-and grievously—mistaken as to the location from which Bello said, in 1967, that he had witnessed the events before and after the slayings; doubly unfortunate, because although the State continued to promote the notion that Harrelson's "in-the-bar" conclusion was only tentative [footnote omitted], Harrelson specifically and adamantly insisted that he never used those or any similar words or ever made the statement to "anyone at all on the face of the earth that [he] was unsure of Bello's test results * * *"; and, most unfortunate of all, because the prosecution never told the defense the critical finding of Harrelson's test—that Bello was in the bar.

91 N.J. 86, at 134, 449 A.2d 1280.

B. The *Brady* Request

It is undisputed that before the 1976 trial, the defense made a specific request for all information concerning Bello's polygraph tests. *Carter III,* 85 N.J. at 313, 426 A.2d 501. The prosecution, believing the oral report to be preliminary, never told the defense about it before trial. *Carter IV,* 91 N.J. at 111, 449 A.2d 1280. The petitioners appealed this alleged violation of the *Brady* rule to the New Jersey Supreme Court, which remanded the case to the trial court for a determination of whether the violation had occurred, and to explore precisely what use the prosecution made of Harrelson's report in confronting Bello prior to the second trial. The trial court found that although the prosecution had "technically" failed to turn over information regarding Harrelson's oral report, that failure was justified under the circumstances. *Carter V,* at 110, 449 A.2d 1280. The New Jersey Supreme Court, on the other hand, unan-

imously agreed that a *Brady* violation had occurred. *Id.*, at 112, 449 A.2d 1280. But by bare 4-3 vote majority, the court ruled that Carter and Artis had failed to overcome the standard of materiality required to show "the suppressed evidence might have affected the outcome of the trial." *Id.*, (quoting *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976)). The majority ruled that the suppressed evidence was merely cumulative. *Carter IV*, 91 N.J. at 118, 449 A.2d 1280. The dissent, however, felt strongly that the evidence was material:

> A more egregious *Brady* violation than the one presented by this case is difficult to imagine. One need not go so far as to impugn the motives of the prosecution in order to reach that conclusion, for it can just as easily be attributed to an appalling lack of basic communicative skills on the part of the principal polygraphist and various members of the prosecution team. But whether the circumstances originate in unworthy motives, colossal bungling, or plain dullness of comprehension, the fact remains that the misunderstandings thus created have proven to be costly indeed: the State withheld from the defendants material evidence favorable to them in connection with the Harrelson polygraph and, unknown to defendants and their counsel, compounded the error by using the mistaken and erroneous polygraph report to get the prime witness against the defendants to change his story again and go back to his original testimony given at the first trial. That all adds up to a deprivation of due process and requires a reversal of defendants' convictions.

91 N.J. at 133, 449 A.2d 1280.

C. The Applicable Standard

In *Brady*, the Supreme Court held that the suppression by the prosecution of evidence favorable to an accused

(and requested by an accused) violates Due Process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87, 83 S.Ct. at 1196. Accepting the conclusion of the New Jersey Supreme Court that Harrelson's oral report was withheld by the state, the court now turns to the issue of whether that non-disclosure is "material" under the Supreme Court's most recent *Brady* analysis, *United States v. Bagley*, ___ U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

The Court first extended the *Brady* rule beyond exculpatory evidence to include impeachment material in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), in which the government failed to disclose evidence of a promise made by the government to its primary witness. Under the *Giglio* standard, a new trial is required if the testimony could, in "any reasonable likelihood," have affected the judgment of the jury. *Id.*, 105 S.Ct at 3388, (quoting *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766). Subsequently, in *United States v. Agurs*, *supra*, the court distinguished three situations involving post-trial discovery of information favorable to the accused that had been known to the prosecution but unknown to the defense. The first situation involves the prosecution's knowing use of perjured testimony, where the verdict must be set aside if there is "any reasonable likelihood" that the false testimony would have affected the judgment of the jury. 427 U.S. at 112, 96 S.Ct. at 2401. The second situation involves the other extreme: where the defendant submits a "general request" or no request for information. In order to obtain a reversal in that circumstance, the Court held the defendant must show the omitted evidence "creates a reasonable doubt that did not otherwise exist." *Id.* The third situation, the middle standard, occurs when the defense makes a specific request for information and the prosecution fails to disclose it. Under this standard a reversal is warranted if the omitted evidence "might have affected

the outcome of the trial." *Id.*, at 104,[7] 96 S.Ct. at 2398.

The issue in *Bagley*, as in the instant case, concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecution failed to disclose requested evidence that could have been used to impeach a government witness. ___ U.S. ___, 105 S.Ct. at 3375. Bagley, convicted of narcotics and firearms violations, alleged that the government withheld evidence that its two principal witnesses had signed during the investigation which stated the government would pay the witnesses for information they furnished. The suppressed documents could have been used by the defense to further impeach the witnesses. In *Bagley*, the Supreme Court adopted a single standard for "no request," "general request" and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused. The court relied on a rule first enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, ___ U.S. ___, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984):

> The evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defendants, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

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[7] In its 1982 analysis, the New Jersey Supreme Court utilized the *Agurs* "might have affected the outcome test," but noted that test was not translatable into the "mere possibility" that the undisclosed information might have helped the defense. "There must be a real possibility that the evidence would have affected the result." *Carter IV*, 91 N.J. at 113, 449 A.2d 1280. The court then cited *United States v. Dansker*, 449 F.Supp. 1057 (D.N.J.1977), *remanded for evidentiary hearing*, 565 F.2d 1262 (3d Cir. 1977), *cert. dismissed*, 434 U.S. 1052, 98 S.Ct. 905, 54 L.Ed.2d 805 (1978), to suggest that under the "might have affected the outcome test" the defendants must show more than a reasonable likelihood that the evidence could have changed the jury's verdict. *Id.*

___ U.S. at ___, 105 S.Ct. at 3384

The "single standard" enunciated by the Court is somewhat semantical, however, because in order to assure that the standard has sufficient flexibility, certain factors must be weighed in determining whether there is a "reasonable probability." The Court noted, for example, that the more specific the request for evidence "putting the prosecutor on notice of its value," the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. Thus *Bagley's* instruction gives birth to yet another sliding scale: the more adverse the effect of the prosecution's failure, the more likely it is that the suppressed evidence will undermine confidence in the outcome.

> [T]he reviewing court may consider directly any adverse affect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

___ U.S. at ___, 105 S.Ct. at 3384

In light of its decision in *Bagley,* the Supreme Court vacated and remanded *United States v. Oxman,* 740 F.2d 1298 (3d Cir. 1984), *U.S. v. Pflaumer,* ___ U.S. ___, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985), which dealt with many of the same *Brady* issues. During the pendency of this habeas petition, the Third Circuit issued its revised opinion in that case, retitled *United States v. Pflaumer,* 774 F.2d 1224 (1985). *Oxman/Pflaumer* involved federal convictions for mail fraud and conspiracy where the government withheld specifically requested impeachment evidence that a

government witness implicated in a checkkiting scheme had been given the promise of use immunity for his cooperation and testimony. The district court ruled that the testimony of the witness in question was "merely cumulative" of the other testimony at trial. *Pflaumer,* at 1229. After analyzing the nature and context of the testimony and applying the middle-level *Agurs* standard, the district court concluded that the nondisclosure "would not have affected the outcome of the trial." *Id.* In *Oxman,* a divided Third Circuit panel reversed the district court, holding that the information withheld was significant impeachment evidence.

In reconsidering the case in light of *Bagley,* a still divided Third Circuit panel reversed itself, holding that the district court "correctly focused on the reasonable probability that, had the [agreement with the witness] been disclosed, the result would have been different. *Id.* The court said, "the government's failure to disclose the immunity agreement in the context of the facts and full record in this case does not undermine our confidence in the verdict." *Id.,* at 1230. The court looked at the evidence of Pflaumer's guilt, both direct and circumstantial, from multiple and corroborating sources, and downplayed the importance of the witness in comparison to the incriminating testimony from other witnesses in the case. *Id.,* at 1230. The court also was careful to distinguish situations, such as the instant case, where witnesses play a more pivotal role in the evidence. For example, the court distinguished *United States v. McCrane,* 547 F.2d 204 (3d Cir. 1976) (per curiam) which involved suppressed letters written by prosecutors on behalf of their sole witness and *Bagley,* which involved one of two incriminating government witnesses.

In the case before the court, the suppressed oral report goes to the veracity of Bello, the only state witness who could identify the petitioners at the scene of the crime. It is crucial; without that cracked and shaky pillar to support

it, the balance of the government's case would probably come crashing down. And although Bello withstood several days of cross-examination, it is unlikely that his credibility would not have been totally destroyed by this disclosure. Obviously then, the greater the effect the undisclosed report can be shown to have had on Bello's credibility, the more material the concealment would become.

D. The New Jersey Supreme Court Findings

The New Jersey Supreme Court dissent approached the effect of the non-disclosure in two ways: First, what use the prosecutor made of the ostensible, but unintended conclusion in Harrelson's written report (confirming the 1967 testimony) that Bello had been "on the street" during the shootings, and second, what use the defendants would have made of the intended, but undisclosed oral report. *Carter IV*, 91 N.J. at 135, 449 A.2d 1280. Before examining the first question, the court must determine what weight to give to factual findings by the court below in a habeas corpus proceeding.

Under 28 U.S.C. § 2254(d), a determination after a hearing on the merits of a factual issue made by a state court of competent jurisdiction [and] evidenced by a written finding, written opinion, or other reliable and adequate writing indicia, shall be presumed to be correct unless the applicant for a federal writ of habeas corpus can establish one of the causes for exception listed in the statute. The § 2254(d) presumption of correctness does not apply to legal questions or mixed questions of law and fact, thus opening the holding to review on collateral attack. *Cuyler v. Sullivan*, 446 U.S. 335, 342, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333 (1980). On remand from the New Jersey Supreme Court, the trial court made numerous findings of fact, among them:

> (13) The prosecution did not cause Bello to recant his recantation through coercion, deceit, or threats of prosecution for perjury; nor did the state misrepresent

> to Bello the results of the polygraph test to get Bello to back to the "on the street" version;
> (14) Bello recanted the recantation when he told Harrelson during the polygraph pre-test interview that Raab, Hogan and Levinson pressured him into recanting the 1967 trial testimony;

91 N.J. 86, 119, 449 A.2d 1280 (quoting trial court's Opinion on Remand p.54).

The Supreme Court majority upheld these findings, which go to the first part of the court's inquiry: what use the prosecutor made of Harrelson's oral report. The trial court's determination as to what use the prosecutor made of the written report in convincing Bello to return to his original story is a finding of fact that assumes a presumption of correctness. *Cuyler v. Sullivan, supra; Swain v. Pressley,* 430 U.S. 372, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977).

Petitioners, on the other hand, argue that the presumption of correctness does not apply because they did not receive a "full, fair, and adequate hearing," under § 2254(d)(6). They continue to allege that the withholding of the report was part of the manipulation of Bello by the prosecution. The Supreme Court dissent concluded that the prosecution knew that Harrelson's written report contradicted its findings regarding the vantage point from which Bello supposedly made his pivotal observations. The dissent concluded that prosecutors "concealed the fact that the "wrong" test result was fed to Bello to break him." *Carter IV,* 91 N.J. at 137, 449 A.2d 1280. This conclusion does not conflict with those made by the trial court, the dissent noted, because after Bello recited pressures to recant, he thereupon told Harrelson, directly contrary to his 1967 testimony, that he was "in the bar" when the shooting took place. *Id.* The dissent also concludes, based on the testimony of an assistant prosecutor at the remand hearing and a letter from the prosecutor to the state attorney-

general on November 22, 1976, that sometime after he had been subjected to the polygraph technique, Bello was confronted with the unintended "on-the-street" result of Harrelson's report, and that this confrontation caused him to return to his 1967 "on-the-street" version. *Id.*, at 136, 449 A.2d 1280. Thus, notwithstanding the factual findings of the New Jersey courts, defense attorneys could still have focused on the prosecution's use of the suppressed information to continue to hammer away at Bello's malleability. They could have also chipped away at a main theme of the prosecution—that Bello was manipulated away from his original testimony because of some sort of bribes from people in the defense camp.

E. The Scope of Review

The court has a much wider purview in considering whether the standard of materiality enunciated by the New Jersey Supreme Court was correct. In *Chaney v. Brown,* 730 F.2d 1334 (10th Cir. 1984) *cert. denied,* ___ U.S. ___, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984), the defendant, convicted of murder and sentenced to death by a state court, sought a writ of habeas corpus, claiming that the prosecution suppressed *Brady* evidence. The Oklahoma Court of Criminal Appeals concluded that the withheld evidence was not material as to guilt or punishment. *Id.*, at 1341. While the Tenth Circuit also grappled with the state court's use of an incorrect standard for determining materiality, it held that the determination of whether withholding of the evidence affected the verdicts so as to infringe due process rights is not a factual finding to which § 2254(d) applies. *Id.* at 1345–46. The court cited *Davis v. Heyd,* 479 F.2d 446, 451 (5th Cir. 1973):

> The question of materiality present in cases in which the accused complains of prosecutorial suppression of material evidence is . . . [a] mixed question of law and fact calling ultimately for a legal determination . . .

> and therefore [is] not entitled to a § 2254(d) presumption of validity.

Id. at 1346.

Respondents urge that the ultimate finding of the trial court, that the non-disclosure of the oral report "in no way would or could have affected the outcome of the second Carter-Artis trial" (Opinion on Remand p. 74) should be entitled to *great weight.* The finding is clearly labelled as a conclusion of law in the opinion on remand and was subsequently rejected by the New Jersey Supreme Court as it is by this court. Therefore, the court turns to what use the petitioners could have made of their knowledge of the Harrelson oral report at trial.

The New Jersey Supreme Court majority determined that the suppressed evidence was "merely cumulative." *Carter IV,* 91 N.J. at 118, 449 A.2d 1280. It quoted the trial court's determination that the jury was fully aware of Bello's criminal background and unlawful activities; that he was portrayed before the jury as a perjurer, liar and thief. "Given the length and scope of the defense's attack on Bello's testimony, there is no reasonable likelihood that further impeaching evidence would have affected the outcome of the trial." *Id.* The court cited three cases where the suppressed evidence was merely cumulative. All are distinguishable from the instant case. In *United States v. Goldberg,* 582 F.2d 483 (9th Cir. 1978), *cert. denied,* 440 U. S. 973, 99 S.Ct. 1538, 59 L.Ed.2d 790 (1979) the government's case consisted primarily of the testimony of a fellow employee. The prosecutor had failed to respond to a specific request for production of the employee's notes, which could have been used to better illustrate his cooperation with the government in hopes of getting better treatment. But the notes merely amplified the agreement, which was already brought out at trial. There was nothing in the suppressed material which was inconsistent.

In *DeMartino v. Weidenburner*, 616 F.2d 708 (3d Cir. 1980), the defendant had been found guilty of accepting a bribe, and the prosecutor failed to make available allegedly exculpatory material by a third party to a government investigator. However, the defendant already had presented other witnesses who could provide the same exculpatory information. In addition, the court noted that the statements were made after the defendant learned that he was the target of an investigation, reducing its evidentiary value. *Id.*, at 711. Finally, *Zeigler v. Callahan*, 659 F.2d 254 (1st Cir. 1981) involved suppressed information about the criminal history of the key government witness. The court held, unlike the instant case, that the information contained in the undisclosed statements did not relate to the substance of the witnesses' testimony. *Id.*, at 266-67.

F. The Materiality Standard

Petitioners claim that they could have made effective use of the lie detector test had they known the true state of affairs. (6/3/81H29-32). The defense could have had additional evidence to undermine the credibility of Bello as an eyewitness during *Wade/Stovall* hearings before the trial court, challenging his ability to identify the defendants and describe their movements if he was in the bar rather than outside the bar. Furthermore, the defense could have attacked the credibility of DeSimone and Kayne for concealing the polygraphist's conclusion that Bello was in the bar. Finally, the defense attorneys could have focused more heavily on Bello's manipulation and on his total unbelievability in their summation.

Use of this information was far more than another attack upon Bello's credibility. If counsel for petitioners had the relevant information, they would have had the means to convince the jury that Bello selected one of several versions, possibly all untrue, merely because he mistakenly believed it had been confirmed by a polygraph test. If he

had been bribed to select one of the versions, certainly it could not be argued that such evidence would have failed to have had a profound impact upon the jury.

What distinguishes this situation from those in which attacks upon credibility are deemed merely cumulative is the fact that Bello was permitted to urge his "final" version as being motivated by the truth rather than by circumstances having no relation to the truth whatsoever. The significance of this failure is not that it denied the defendants just one more opportunity to challenge the credibility of Bello. The witness had been confronted with his several versions and thus his credibility was placed squarely in issue. But the petitioners were deprived of the opportunity to demonstrate why the witness settled on this particular version and to bring out the role of the prosecution in that choice.

Absent the potent ammunition this knowledge would have afforded the defense, Bello was free to say that he had selected this one of several versions because it was "true." However, if defendants had known all of the relevant facts, they could have argued not only that the choice was predicated upon facts submitted by the prosecution, but that those facts were false. The jury could well have concluded then that if Bello had been told that the "in-the-bar" version or some other version was found true by the polygrapher, he would have told that version. From those circumstances the jury could have concluded that Bello's choice of the final version was not a decision based on truth but rather one influenced by a premise, and a false one at that, furnished by the prosecution.

Although a finding of intentional misconduct on the part of the prosecution enhances petitioners' argument, it makes no real difference under the factual circumstances of this case. Whether the conduct was deliberate or negligent, the consequences to the petitioners were the same: they were deprived of a vital opportunity to totally discredit the key

and only eyewitness to the crime. Indeed, if the trial court knew and was satisfied that Bello finally selected one of his many versions merely because he was told that it was independently confirmed by the polygrapher (albeit mistakenly), it might well have stricken his entire testimony.

At trial, counsel for the petitioners feared opening the door to introduction of the lie detector results, believing it would show simply that Bello's 1967 version was truthful. Had they known about the conflicting oral report, and Harrelson's insistence as to its accuracy, their fears would have dissipated. The New Jersey Supreme Court majority downplays this stratagem theorizing that it would have involved introduction of the lie detector results, which it cited as potentially even more damaging than any possible added impeachment. *Carter IV,* 91 N.J. at 116, 449 A.2d 1280. Respondents refer to the possibility as "insurmountable rehabilitation of the witness." (RB p. 98)

The petitioners argue that the state Supreme Court misstated facts in relation to the lie detector tests which are significant. For example, the court said that if laid out before a jury, the Harrelson test would have established the polygraphist "entertained no doubt at all that Bello was truthful when he identified the defendants as the murderers. *Id.* In fact, Bello never identified Carter and Artis as the murderers. (Appendix in Support of Carter's motion seeking order compelling withdrawal of Passaic County Prosecutor 37a–57a) Secondly, the court said Bello told Harrelson he saw Carter and Artis "outside the bar with weapons immediately after the shooting." *Carter IV,* at 120, 449 A.2d 1280. In the actual test, Bello was not asked, nor did he say that the two men had weapons, although he told Harrelson he saw them outside the bar. Appendix in Support, *supra.*

The dissent points out that if the state tried to show the truth of the polygraph, the defense could have shown its contradictions; the entire notion of polygraph evidence

having validity in regard to Bello could have been laid to rest if the state tried to introduce yet another polygraph report it had obtained based on Harrelson's records which said Bello was truthful when he said he was "on-the-street" at the time of the shooting, while Harrelson maintained throughout that Bello's "in the bar" version remained correct.

Had the trial court been aware of all the facts, it could have formulated some way in which the polygraph reports could have been limited for the purposes of credibility without allowing the prosecution to use them to bolster their case. Numerous instructions or stipulations were available to avoid the polygraph results ever being presented to the jury, i.e., Mr. Bello was told that a polygraph had confirmed his "on the street" version. Either: This was not true (or) This was a mistake.

Thus, to view the withholding of the oral report as merely cumulative "is to gloss over the essential nature of that inconsistency and misgauge its potential impact," *Id.*, at 139, 449 A.2d 1280 (Clifford, J., dissenting). It is sufficient to undermine confidence in the outcome? If the outcome depends in large measure on Bello's testimony, how could it not? "Never before could defendants argue so persuasively that Bello was in all respects a complete, unvarnished liar, utterly incapable of speaking the truth." *Id.*

G. The Totality of the Circumstances

The court must now assess the adverse impact of the prosecution's failure to turn over the oral report in light of the totality of the circumstances. In its summation, the state divided its case against the petitioners into six "strands" of evidence. (45T147)

1. The identification of the killer's automobile by Patricia Valentine.

2. The identification of petitioners by Alfred Bello.

3. Circumstances surrounding the apprehension of the petitioners.

4. Motive.

5. Location of a bullet and shotgun shell in the trunk of Carter's car.

6. False alibis presented by petitioners at the 1967 trial.

The court has ruled upon the use of the racial revenge motive and the reliability of Bello's testimony. Each one of the remaining strands is frayed.

1. *Identification of the killer's automobile:* Patricia Valentine, the witness who lived above the Lafayette Bar, testified at trial that the white car leaving the murder scene had taillights identical to those of the white 1966 Dodge Polara brought to the scene later by police with Carter and Artis inside. (15T145–77). She and officers at the scene testified that after she saw the taillights of Carter's car, she became hysterical and ran away. Mrs. Valentine also testified that the car had out-of-state license plates with yellow or gold numbers and a dark blue background. Bello testified that he gave police a description of the car as a white, highly, polished vehicle, with triangular taillights, and further identified Carter's car at the scene as the "identical car" (19T182,195).

Petitioners argue that there is nothing to indicate from police reports that Mrs. Valentine identified the Carter car when it was brought to the scene (30T63). She testified that she saw only the rear of the car. (16T97) Moreover, her testimony that the taillights were identical was new to the second trial. In the first trial she said merely that the rear of the car was "similar." (16T100) Petitioners claim her description of the taillight configuration was identical that of a different Dodge model, the Monaco, which she herself identified as the model of the perpetrator's car in her 1966 grand jury testimony. (16T141–142) A Paterson police officer testified that she had identified

the taillights of Carter's car at the scene, but conceded on cross-examination that there was no mention of this identification in his reports or at the 1967 trial. (30T63–67).

While Bello also claimed at trial to have identified the getaway car to police when they arrived at the scene, the police radio merely described the car as white with two black males inside (30T88). The petitioners also present conflicting evidence as to what information was originally given to police and broadcast. This has some significance because police had chased and/or stopped several white vehicles after the shooting. (40T97, 99, 101, 163).

2. *Eyewitness Identification:* At the scene Bello gave a statement identifying Carter's automobile but not the petitioners. (30T177–178, 34T175) Later he testified that he feared providing the information because he was on parole and had been a lookout in an ongoing burglary when the killings occurred. (19T196–97) After the shootings, he took money out of the cash register and gave it to Bradley, his accomplice in the burglary. *Id.*

At trial, Bello said he recognized Carter and Artis when they were brought to the crime scene (21T92–93), and that he would recognize Carter because he had seen him twice before, once in a boxing match while Bello was an inmate at a state reformatory, and another time at a Paterson bar (20T232–234, 240, 241). Petitioners argue that Bello had never seen Carter at close range, and his descriptions began taking shape only after he saw the petitioners at the scene. (PB at 41, PRB at 19).

Bello's identification must be taken in context with the subsequent changes in his story (See: The *Brady* Violation, *infra*). His malleability was first demonstrated during an interview with two members of the prosecutor's staff. (PB at 43–47, citing Defendants' appendix on appeal 3DaT42, 43); and his motivation was crystalized when, shortly after the trial, police officers and others tried to help him obtain

a $10,000 reward offered to persons' providing information that led to the arrest and conviction of the Lafayette Bar killers (24T32, 34).

Bello continued to rely upon police to intercede on his behalf with the courts (29T59-64) until he was finally told, in 1974, that nothing more would be done for him. (29T67) It was at about that point that Bello began to talk to people in the Carter camp concerning a recantation. (37T23-24)

Bar patron Marins testified that the killer who wielded the shotgun had a mustache, but the respondents stress that Marins was in shock, and probably drunk. (15T152) Petitioners respond that Marin's testimony was extensively detailed and was relied upon by the state to determine the entry and exit of the killers.

Petitioners point out that Marins could not identify them the hospital (17T185). Later, he described both men as being about six foot tall, one light colored with a pencil line mustache. Neither was described as having a goatee. (17T178-222) Bar patron Tanis, at the hospital, gave varying descriptions, and the investigator who interviewed her said she told the same story as Marins: "Both men were Negros, and the one with the shotgun was about six feet, slim build, light complexion and a pencil line mustache." (17T173). Petitioner Carter, at the time, was described at five foot seven inches, 160 pounds, very dark complexion, well-built, with a prominent goatee. Artis was described as being six foot one inch, with a slight to medium build, a medium complexion, and clean-shaven. (PB at 22). Before Bello came forward, the Passaic County detective who led the investigation told the first grand jury on June 29, 1966 that "the physical description of the two holdup men is not even close." (PB at 22, citing transcript Defendant's appendix on appeal 4DaT57)

Mrs. Valentine said the men wore sports jackets, while the one who entered the passenger side of the getaway

car was wearing a fedora. (16T27-28). According to Bello's initial description, the first man was a black male wearing a fedora and sports jacket, thin, and about five foot eleven inches tall; the second man was thin and about the same height. (18T55-56; 30T24). When brought to the scene, Carter wore a white jacket with thin stripes, a red vest and dark pants and straw hat (30T92). Bello described the other man as wearing dark clothing (19T164), yet Artis wore a light blue sweater with his initials imprinted, a blue v-neck shirt and light blue pants (29T172; 42T217).

3. *Movements of the Petitioners:* About four minutes after the reported time of the shooting, Paterson police were chasing a white car speeding out of Paterson (30T86-87). Some ten minutes after the shootings, the same two policemen, having failed to stop the other white car, stopped the car carrying Carter, Artis and John Royster. They checked the car's registration, recognized Carter, and allowed the car to go on. (30T91-95). This was about 15-16 blocks from the murder scene. (30T120-121). Shortly after, a police description of the car was broadcast, the two officers again stopped the Carter car, this time even closer to the crime scene, this time with only the petitioners inside.

The respondents theorize that the speeding car and Carter's car were one and the same, and after it had escaped the police chase, the car stopped at the home of Edward Rawls, where Carter and Artis dropped off the murder weapons and changed some of their clothing. They then stopped at the Nite Spot to pick up Royster for alibi purposes. (RB at 32)

Earlier, the state charged that Carter had engaged in a search for weapons (See: Racial Revenge Motive, *infra*). The testimony corroborating Carter's latest whereabouts before the killings was relied upon by the state was that of Elwood Tuck, the manager of the Nite Spot, who had last seen Carter in his back room about 2:15 a.m.

Petitioners point out that the policemen who stopped his car could not identify it as the one they chased out of town (30T125–126). Another police officer testified that he saw the Carter car and asked both headquarters and the officer at the crime scene whether they wanted the car stopped, and he was told no both times. (31T166–168). The 1967 trial testimony of the officers in charge of the crime scene made no mention of a detailed description of the getaway car or an identification of Carter's car by Bello.

4. *The Bullet and Shell:* The state produced a live shotgun shell and a live revolver bullet, each respectively matching the caliber of the weapons used at the Lafayette Bar. (36T46–64) A Paterson police detective testified he found the shell, a .12 gauge "Western," in the trunk of Carter's car under boxing equipment and found a .32 caliber S & W long bullet on the floor of the front seat (35T127–130). A newspaper reporter friendly with the detective and present in the early morning hours at the police garage where the discovery took place testified that he saw the detective find the ammunition. (35T277–315) Two other people testified that the detective told them about the discovery soon afterward.

Petitioners argue that the detective who found the ammunition had not vouchered it with the police property clerk for five days. The significance of the delay, according to petitioners' theory, is that the detective either intentionally or unintentionally produced ammunition found earlier that evening in the course of investigating the Holloway killing. The bullet found in the Carter car was brass cased, rather than copper coated like those found at the Lafayette Bar. (36T63, 75) Similarly, the shotgun shell found in the Carter car was an older model, with a different wad and color. (36T89, 90, 234, 236).

Moreover, in his reports on the Holloway murder, the detective had identified two type of shells found as Sears Sportsload and Western (35T144–160). The detective later

amended his report to say there were no Westerns found after the Holloway murder. (35T144, 152)

Petitioners also dispute the accuracy of the interrogation of Carter in which he purportedly denied lending his car or knowing about the ammunition; two points upon which the state relies heavily. Petitioners note the statement was never seen or acknowledged by them (32T89, 140) and that the detective who interrogated them conceded destroying his original notes after reducing them to typewritten form. (32T96–97). The notes do not include any reference to Carter's whereabouts between 2 a.m. and 3 a.m., a topic one would expect to be the primary reason for the interrogation in the first place. The New Jersey Supreme Court criticized the admissibility of the notes, but concluded that the affirmative probative value of these oral statements was virtually nil. *Carter I*, 54 N.J. at 442–446, 255 A.2d 746.

5. *The False Alibi:* On the surface, the most damaging evidence against Carter may have been testimony at the 1976 trial concerning a false alibi fabricated by or on behalf of Carter at the 1967 trial. The alibi was meant to cover the time period shortly before and after the murders; from 2:15 a.m., when Tuck last saw Carter at the Nite Spot, through 2:40 a.m., when Carter was stopped in his car 15 or 16 blocks from the crime scene.

Welton Deary had testified in 1967 that he saw Carter at the Nite Spot with Catherine McGuire, her mother, Anna Mapes Brown, and William Hardney. He later testified that he was lying (27T116–119), and that he had actually seen Carter about 1 a.m. at another bar, Richie's Hideaway with Edward Rawls (27T147). He alleged that Carter's defense team had asked him to change his story. (27T119–120)

Anna Brown testified in 1967 that Carter had driven the two women home from the Nite Spot about the time the killings took place. In 1976, she said that testimony

was false and that Carter had driven the two women home another night. Catherine McGuire told a similar story, and also testified that she received a letter from Carter while he was in jail asking her to make sure her testimony covered him at 2:30 a.m. That letter and others, ruled inadmissible at trial because they were illegally obtained, were nevertheless permitted to be related to the jury in order to refresh the recollections of witnesses. (28a.m.T61–71).

William Hardney was not an alibi witness in 1967 because he was living in Washington, D.C. and was afraid to come to New Jersey, where he was a fugitive from non-support charges (27T51). Hardney testified in 1976 that Carter wanted him to back up the McGuire-Brown alibi by saying he saw Carter take the two women home from the Nite Spot about 2:15 a.m. (27T54).

Respondents further allege that Rawls and Neal Morrison, were part of a team of defense helpers taking witnesses to a motel that served as defense headquarters during the 1967 trial. There, the state says, defense counsel helped induce the false testimony (28a.m. 117–133; 27T120; 27T185)

Petitioner Carter, however, stands by his original alibis, and points to changes in the lives of the witnesses that paralleled significant changes in their testimony from 1967 to 1976. (PB at 65). Deary, for instance, who was unemployed the night of the killings, subsequently became a Paterson Housing Authority policeman. (27T143). He was interviewed by prosecutors while on duty and in uniform. Another Carter associate, Merrit Wimberly, testified that Deary told him he had changed his testimony to protect his job (39T51) Wimberly, a 1967 alibi witness, repeated his 1967 testimony at the second trial that he saw Carter leave the Nite Spot at 2:15 a.m. with McGuire and her mother and return about five minutes later, and was still at that bar when Wimberly left at 2:30 a.m. (39T47). Cath-

erine McGuire was engaged to a sergeant in the Paterson police department in 1976 (39T51). Prosecutors threatened her with perjury for her conflicting statements (28a.m. T113).

William Hardney testified that several Paterson detectives paid him a late night visit in Washington in October 1976, and questioned him for hours without allowing him to contact his lawyer. (27T75–79). He testified that the investigators returned to his home several times in the presence of his family, threatening to arrest him and his wife for obstruction of justice. Ultimately he was arrested and brought to Paterson during the 1976 trial. He was released only after he testified on November 27. (27T110). However, Hardney's presence at the Nite Spot the night of the killings was confirmed by Tuck, who was relied upon by the state as well as the petitioners (39T224).

Raymond Brown, the lawyer who represented Carter in 1967, testified that McGuire and his mother both made voluntary statements and were not pressured in any way. (42T22–33). Brown also disputed the accusation that he tried to change Deary's testimony as well. Artis' counsel at the 1967 trial, Arnold M. Stein (now a state Superior Court judge), confirmed Brown's testimony and the voluntariness of the women's statements. (42T130–133)

Finally, petitioners point to *United States v. Burse*, 531 F.2d 1151 (2d Cir. 1976) to underscore the point that the jury should not have utilized disbelief of an alibi defense to lessen the state's burden of proving guilt by a reasonable doubt.

Petitioners emphasize the doubt surrounding respondents' theory of events by summarizing the respondents' best evidence and assuming, *arguendo*, that: Valentine identified the Carter car at the scene and at the police garage, that Bello identified Carter and Artis at the scene as well as identifying the car at the scene and at the police garage, that the police indeed found the am-

munition in the car at headquarters and that the petitioners failed their initial lie detector tests and gave conflicting stories to the police. If this is all true, why were petitioners released without being charged? Why were they exonerated by the grand jury, and why did a Passaic County detective tell the first grand jury that the policeman who administered the initial lie detector test believed Carter was not a participant in the crime, although he had knowledge as to who was responsible? (Grand Jury transcript, reproduced PB, appendix, at B3)

Even at its strongest links, the government's chain of evidence has been substantially called into question by petitioners. Therefore, considering the totality of the circumstances, the court concludes that had the evidence withheld by the state involving Harrelson's oral report been disclosed to the defense, there is a reasonable probability that the result of the trial would have been different. *Bagley,* ___ U.S. ___ , 105 S.Ct. at 3384.

THE REMAINING CLAIMS

The court finds that the petitioners have shown, by a preponderance of the evidence, that (1) the state violated the requirements of the *Brady* rule by failing to disclose the results of a lie detector test given by the state to its only "eyewitness," and (2) that the state violated the Due Process rights of petitioners by improperly appealing to racial prejudice during the trial by arguing that the killings were motivated by racial revenge.

While the court has reviewed all the claims in the petitions, the two grounds cited above are, in the opinion of the court, the petitioners' most powerful arguments for the granting of the writ and are clearly supported by the record. Accordingly, the court finds it unnecessary to reach the merits of the remaining claims, Grounds 4, 6, 7, 8 and 10.

EXHAUSTION OF STATE REMEDIES

In *Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), the Supreme Court ruled that 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a writ of habeas corpus containing any claims that have not been exhausted in the state courts. This doctrine does not bar relief where the state remedies are inadequate or fail to "afford a full and fair adjudication of the federal contentions raised." *Id.,* at 516, n. 7, 102 S.Ct. at 1202, n. 7, (citing *Ex Parte Hawk,* 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944)). The court noted that if the petition contained both exhausted and unexhausted claims, a prisoner could always amend his petition to delete the unexhausted claims rather than return to state court to exhaust the remainder of his claims. *Id.,* at 520, 102 S.Ct. at 1204.

Carter amended his petition to delete the unexhausted claim in Ground 12. However, Artis argues that the delay by the New Jersey courts in adjudicating the claim in Ground 12 has been so extraordinary that it inflicts a manifest injustice upon him. Counsel for Artis has asked the court to declare that, because of this delay, the petitioner has, in effect, exhausted his state remedies. The state opposes this motion.

On November 1, 1985, during the pendency of this petition, the New Jersey Supreme Court denied the petition for certification by Carter and Artis. Therefore, the court finds that petitioner Artis has exhausted his state remedies, and is entitled to full consideration of his petition.

THE APPROPRIATE RELIEF

Under 28 U.S.C. § 2243, the court is instructed to dispose of federal habeas corpus proceedings "as law and justice require." "The prevailing practice under this mandate is to delay the petitioner's discharge so as to allow

the state reasonable time in which to retry the petitioner if it wishes to do so." *Ridge v. Turner,* 444 F.2d 3, 5 (10th Cir. 1971). *Whitely v. Warden, Wyoming State Penitentiary,* 401 U.S. 560, 569, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971).

Immediate release from custody with prejudice is rarely awarded, and when it is, the appellate courts may find abuse of discretion. Yackle, *Postconviction Remedies,* § 141 at 530. *Bromley v. Crisp.* 561 F.2d 1351 (10th Cir. 1977), *cert. denied,* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 499 (1978) (reversing a district court's order vacating a state judgment with prejudice). *Hammontree v. Phelps,* 605 F.2d 1371 (5th Cir. 1979), *Ridge v. Turner, supra.*

The killings that led to the petitioners' indictment and conviction occurred nearly 20 years ago, and to retry such conflicting events, further aggravated by dim memories, does not appear to serve the interests of justice. Moreover, to again use Bello as such a key witness, after his unbelievable series of recantations and recantations of his recantations, his complete and utter malleability at the hands of all parties, and his own sordid criminal history, would probably place his competency as a witness beyond the outer limits of due process.

Yet, even though a new trial may very well be a practical impossibility, this is a decision that in the interests of comity should be made by the state. In *Gardner v. Pitchess,* 731 F.2d 637 (9th Cir. 1984), the district court granted a writ on the basis of ineffective assistance of counsel. In that case the magistrate recommended dismissal on the grounds that a fair retrial would be difficult. The Ninth Circuit ruled that the unfairness of a retrial was not properly before the district court, and could be better reviewed by the state courts if a retrial occurs. *Id.,* at 640.

Therefore, the court will grant the writ as to both petitioners, mindful that the state can seek a retrial, but

hopeful that constitutional considerations, as well as justice and compassion, will prevail. See: *Clausen v. Clerk of Circuit Court,* 537 F.Supp. 1233, 1237 (E.D.Wisc. 1982), *White v. Estelle,* 554 F.Supp. 851, 859 (S.D.Tex. 1982).

The court does not arrive at its conclusion lightly, recognizing that it is in conflict with a decision of the highly learned and respected New Jersey Supreme Court (albeit a 4-3 decision). However, this court is convinced that a conviction which rests upon racial stereotypes, fears and prejudices violates rights too fundamental to permit deference to stand in the way of the relief sought.

It would be naive not to recognize that some prejudice, bias and fear lurks in all of us. But to permit a conviction to be urged based upon such factors or to permit a conviction to stand having utilized such factors diminishes our fundamental constitutional rights.

Furthermore, the prosecution has resources unavailable to the average criminal defendant. Therefore, it is imperative that information which is essential to the defense in the hands of the prosecution be made available to the accused. If trials are indeed searches for the truth rather than efforts to conceal it, full and fair disclosure is necessary to protect and preserve the rights of the accused against the awesome power of the accusor.

Although extended appeals in criminal matters have been widely criticized, the need for review is amply demonstrated by this matter. There is a substantial danger that our society, concerned about the growth of crime, will retreat from the safeguards and rights accorded to the accused by the constitution. The need to combat crime should never be utilized to justify an erosion of our fundamental guarantees. Indeed, the growing volume of criminal cases should make us even more vigilant; the greater the *quantity*—the greater the risk to the *quality* of justice.

Notwithstanding that the courts which have reviewed this matter have differed, the myriad decisions reflect that

petitioners' case has received the most thorough judicial examination our system of justice has to offer. The record is one of which the judiciary can be proud and one from which the public can take comfort; that no matter how complex the issues, how voluminous the record or how ancient the cause, the case received thorough and thoughtful attention from all judges who reviewed it.

For the above reasons, the writ is granted to the Petitioners and their counsel are directed to submit an appropriate order forthwith in conformance with this opinion.

APPENDIX C

91 N.J. 86

STATE of New Jersey,
Plaintiff-Respondent,

v.

Rubin CARTER and John Artis,
Defendants-Appellants.

Supreme Court of New Jersey

Argued March 9, 1982

Decided Aug. 17, 1982

On remand after prior appeal, 85 N.J. 300, 426 A.2d 501, defendants were again convicted of first-degree murder. The Appellate Division affirmed. The Supreme Court granted petitions for certification, and remanded, retaining jurisdiction. On remand from the Superior Court, Law Division, the Supreme Court, Schreiber, J., held that: (1) evidence tending to show that killings of white men in bar, for which black defendants were being prosecuted, were revenge for earlier killing of black man in another bar was admissible, and was not so prejudicial as to outweigh its probative value; (2) prosecutor's argument did not unfairly appeal to racial prejudice; (3) certain nondisclosure by prosecution was not prejudicial; (4) new trial on ground of newly discovered evidence was properly denied; and (5) there was no error in permitting State to use, while refreshing recollection of witnesses, letters found to have been obtained in violation of the Fourth Amendment.

Affirmed.

Clifford, J., dissented and filed opinion in which Wilentz, C. J., and Sullivan, J., joined.

Leon Friedman and Myron Beldock, New York City, members of the New York bar, for defendant-appellant Rubin Carter (Busch & Busch, New Brunswick, and Perkins & Cassidy, Jersey City, attorneys; Leon Friedman, Myron Beldock, Thomas I. Atkins, Charles E. Carter and James I. Meyerson, New York City, members of the New York bar, of counsel).

Lewis M. Steel, New York City, a member of the New York bar, for defendant-appellant John Artis (Louis S. Raveson, Jeffrey E. Fogel, Newark, and Perkins & Cassidy, Jersey City, attorneys; Lewis M. Steel, Leon Friedman, Thomas I. Atkins, Charles E. Carter and James I. Meyerson, New York City, members of the New York bar, of counsel).

John P. Goceljak, First Asst. Prosecutor, and Ronald G. Marmo, Chief Asst. Prosecutor, Patterson, for plaintiff-respondent (Joseph A. Falcone, Passaic County Prosecutor, Little Falls, attorney).

The opinion of the Court was delivered by

SCHREIBER, J.

This is another episode arising out of the murder convictions of Rubin Carter and John Artis. The matter first came before us in 1969 following their convictions for the murders of a bartender and two patrons in the Lafayette Bar and Grill in the city of Patterson. Three life sentences were imposed on each defendant. Two consecutive life sentences were imposed upon Carter, with the third to be concurrent with the second life term. As to Artis, the three life terms were concurrent. We affirmed the convictions. 54 *N.J.* 436, 255 *A.2d* 746 (1969). The United States Supreme Court denied their petitions for *certiorari.* 397 *U.S.* 948, 90 *S.Ct.* 969, 25 *L.Ed.*2d 130 (1970).

The defendants sought a new trial, asserting that the State's key identification witnesses had recanted their trial testimony, that the prosecutors had knowingly permitted these witnesses to testify falsely, and that the State had failed to disclose material evidence that would have tended to exculpate the defendants. Two separate motions for a new trial were denied by the trial court, *State v. Carter*, 136 *N.J.Super.* 271, 345 A.2d 808 (Cty.Ct.1974), and *State v. Carter*, 136 *N.J.Super.* 596, 347 A.2d 383 (Cty.Ct.1975). Defendants appealed and we certified the matter on our own motion. We vacated the judgment because the State had not disclosed to the defendants a tape recording of an interview of an eyewitness, Alfred Bello, containing information material and favorable to the defendants' cause that "clearly possessed the capacity to have affected the jury's evaluation of the credibility of Bello's . . . identification testimony." 69 *N.J.* 420, 434, 354 A.2d 627 (1976).

The retrial commenced on October 12, 1976 and concluded on December 21, 1976 when the jury again returned verdicts of guilty of murder in the first degree. The Appellate Division affirmed in an extensive unreported opinion. We granted the defendants' petitions for certification, 84 *N.J.* 384, 420 A.2d 314 (1980). After oral argument, we remanded the cause to the trial court to hold hearings and make factual findings to determine whether the rule in *Brady v. Maryland*, 373 U.S. 83, 83 *S.Ct.* 1194, 10 *L.Ed.*2d 215 (1963), had been violated and whether the violation warranted vacation of the judgments of conviction. Further, if the trial court found no *Brady* violation, it was to determine whether a new trial should be granted based on newly discovered evidence. *State v. Carter*, 85 *N.J.* 300, 426 A.2d 501 (1981). We retained jurisdiction. We intimated no view on the ultimate merits of these issues or of defendants' numerous other claims of error.

The trial court held extensive hearings and submitted detailed findings. It found that there was no *Brady* violation, and that a new trial was not warranted on the

basis of newly discovered evidence. We held further oral argument and now affirm.

I

Weight of the Evidence

Both defendants argue that the jury verdicts were contrary to the weight of the evidence and that the trial court erred in not granting their motions for a new trial. Our obligation in this respect is to determine whether "it clearly and convincingly appears that there was a manifest denial of justice under the law." See *State v. Sims*, 65 N.J. 359, 373-74, 322 A.2d 809 (1974); R. 2:10-1. Indeed, in reviewing a trial court's action on a motion for a new trial following a jury verdict, the appellate court must weigh heavily the trial court's "views of credibility of witnesses, their demeanor, and [its] general 'feel of the case.' " *Id.* at 373, 322 A.2d 809. The evidence should be sifted to determine whether any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present. *See Jackson v. Concord Co.*, 54 *N.J.* 113, 253 *A.2d* 793 (1969). Tested by these standards, the verdict is sustainable.

A brief summary of the evidence introduced in the second trial is in order. The tragedy occurred at the Lafayette Bar and Grill on June 17, 1966. William Marins was seated at the bar with his friend, Fred Nauyaks. Hazel Tanis was also there and the bartender, James Oliver, was behind the bar. At about 2:30 a. m., two armed black men entered and began shooting. Oliver and Nauyaks were killed immediately. Tanis suffered multiple gunshot wounds and died four weeks later. Marins was shot in the temple.

Patricia Valentine lived above the tavern. Awakened by gunshots at about 2:30 a. m., she ran to the window and saw two black men run to an automobile and drive away. The car was white and had taillights shaped like triangles, wider at the outside and tapering toward the center. The

rear lights did not extend across the whole back of the car. It had out-of-state license plates with yellow or gold numbers on a dark blue background. Mrs. Valentine saw the car leave the corner of Lafayette and East 18th Streets, where the tavern was located, and head west on Lafayette Street toward East 16th Street. She threw a raincoat over her pajamas and ran downstairs to the bar where she met Bello at the front door. He cautioned her not to go inside, but she did. She observed the scene and returned to her apartment and called the police. Mrs. Valentine dressed and went back downstairs. She gave Police Officer Alexander Greenough a description of the car. Shortly before 3:00 a. m., two police cars escorted a white car to the Lafayette Bar and Grill. Carter and Artis were in that car. It was a new white 1966 Dodge Polara with New York State license plates having yellow numbers on a dark blue background. Carter, who had leased the car, had not loaned it to anyone else that night. Mrs. Valentine identified this vehicle as the same one she had seen twenty minutes earlier.

Bello testified that Arthur Bradley and he were in the process of breaking into the Ace Metal Company offices located near the Lafayette Bar and Grill. Bello, who was acting as a lookout, walked down Lafayette Street toward the tavern to purchase some cigarettes. He testified at the trial that he heard some shots and saw two black males come around the corner, one carrying a shotgun and the other a pistol. Bello ran into a nearby alleyway. When he heard the screeching of a car, he came out and saw a white vehicle drive away. He noticed that the rear lights were triangular in shape and that the car had New York or Pennsylvania license plates. Bello went into the bar, took some money from the cash register and telephoned the police.

Bello told Officer Greenough of the white car with the blue and yellow license plates and the two black males. When Carter and Artis were brought to the bar in the

1966 Dodge automobile, Bello identified it as the same vehicle he had previously seen. Bello did not tell the police that Carter and Artis were the same individuals he had previously seen with the weapons. A month later, Bello met Paterson Police Officer Donald LaConte and explained why Bradley and he had been in the vicinity. In October, Bello told LaConte that Carter and Artis were the two armed men at the scene. He identified them to the police in an interview on October 11 and in a formal statement signed on October 14, 1966. He testified to the same effect in the 1967 trail.

Subsequently, while in jail in 1974, Bello signed a statement at the behest of Fred Hogan of the Monmouth County Public Defender's Office in which he recanted his 1967 trial testimony. In that statement he said that he could not positively identify Carter and Artis. On October 30, 1975, Bello met with Assemblyman Eldridge Hawkins who, at Governor Byrne's request, was investigating the case. His affidavit obtained by Hawkins stated he was in the bar when the shooting occurred. He did not recall seeing Carter and Artis in the bar, but did remember seeing them when he ran outside the bar. Bello also gave a second affidavit to Hawkins in which he related that two black men came in the side door and started shooting.

In December 1975, Bello testified before an Essex County Grand Jury. He said then that as he entered the tavern, he noticed a white Dodge at the side of the building. Two black males entered by the side door and began shooting. He went out the front door and, as he turned left, he ran into a white man. He then turned in the other direction and saw Carter and Artis. At the 1976 trial Bello returned to his original story. He testified that Carter and Artis were the two men he had seen outside the Lafayette Bar and Grill carrying a shotgun and pistol, respectively.

Officers Greenough and John Unger were the first police to reach the scene in response to a radio report of the

shooting. They were flagged down by Bello who was standing by the curb. Sergeant Robert Tanis and Officer John Nativo were on patrol when they received a radio alert at about 2:34 a. m. They had been traveling west on Broadway. They turned around and went east on Broadway to East 18th Street and then headed north toward the tavern. While traveling on East 18th Street near Hamilton Street, they observed a white car turn into 12th Avenue. See Appendix I, which is a map of the area and shows the routes of the vehicles involved.

Sergeant Theodore Capter and Officer Angelo DeChellis were on patrol on 17th Avenue near East 24th Street, when they received the same radio alert. While driving up East 24th Street toward the tavern, they saw a white car with out-of-state plates cross the intersection of East 24th Street and 12th Avenue traveling east on 12th Avenue. Immediately thereafter, Capter and DeChellis were told that the getaway car was white and was occupied by two black males. Surmising that the car would be headed to New York, they proceeded down 10th Avenue. This route would allow them to reach the bridge over the Passaic River more rapidly than a vehicle going down 12th Avenue, which ends several blocks west of the River. When the officers reached the bridge and Route 4, they did not see the white car. They turned around and returned on Broadway, which is an extension of Route 4. As they approached East 28th Street, a white car crossed in front of them. They stopped it at the corner of East 28th Street and 14th Avenue. It was 2:40 a. m., six minutes after the initial radio alert.

The white car with its New York license plates and butterfly taillights was occupied by Artis, Carter and a third man, John Royster. Capter checked Artis's driver's license and the registration and let the car go. Capter and his partner proceeded to the Lafayette Bar. When they arrived, Bello described the car he had seen. Capter testified that upon hearing this description, "I looked at my

partner and he looked at me and we took off looking for the car again." They proceeded down East 18th Street and saw the same car at the intersection of Broadway and East 18th Street. They pulled the car over. Only Carter and Artis were in it. After the patrol car of Sergeant Tanis and Officer Nativo arrived, they escorted Carter's vehicle to the Lafayette Bar.

The Carter-Artis vehicle was then driven to police headquarters and was searched. The police found a 12-gauge shotgun shell in the trunk and a red .32 caliber S & W long shell on the floor alongside the front seat. Both were live shells. The seven spent bullets located at or near the scene were identified as .32 caliber S & W long shells. The unfired bullet found on the front floor in the car was the same caliber and would fit in the same gun from which the spent bullets had been shot. Further, a ballistic expert testified that the same weapon could be used to shoot the 12-gauge shotgun shell found in the trunk and the shotgun shells found in the tavern.

The automobile search did not uncover any pistol or shotgun. Bello had testified that Carter had a shotgun and Artis a pistol but no weapon was found in the car or on their persons when apprehended. Moreover, the attire of Carter and Artis was not the same as described by the witnesses. Valentine testified that one of the two men wore a hat and both wore sports jackets. Officer Capter said that Carter was wearing a hat and sports jacket and Artis was not wearing a sports jacket when first stopped by the police.

The State contended that the jury could reasonably infer that after leaving the bar, the Carter vehicle stopped at Eddie Rawls' home at the corner of East 28th Street and 12th Avenue and deposited the weapons and some clothing there. Rawls, the bartender at the Nite Spot, was well acquainted with Carter and was a close friend of Artis. He was the stepson of Leroy Holloway, a black bartender

who had been shot to death by a white man in a dispute over a business matter several hours before the Lafayette Bar murders.

The movement of the car and the fact that several minutes had elapsed between the time the car was first spotted and when it was stopped by Sergeant Capter could justify this inference. Sergeant Capter saw the white car speeding across 12th Avenue at 24th Street and he stopped the car at 14th Avenue and East 28th Street. Carter and Artis could have stopped briefly at Rawls' house before proceeding to the point where Capter pulled the car over. See Appendix I.

Some consideration may also be given to the testimony of three alibi witnesses who had testified in 1967. Welton Deary stated at the first trial that he was at the Nite Spot, located five blocks south of the Lafayette Bar on East 18th Street, at 2:00 a. m. on June 17, 1966 and he had seen Rubin Carter with Catherine McGuire and her mother. He further testified that Carter told him that he was going to drive them home and then he would return. At the 1976 trial Deary admitted that these statements were not true and that he realized it when he testified in 1967.

Catherine McGuire also testified at the 1967 trial. At that time she indicated that Carter brought her home at about 2:15 on the morning of June 17, 1966 and that he left around 2:30. At the 1976 trial she testified that this was not true and that she was aware of this in 1967. Catherine McGuire also testified that she had received a letter from Carter while he was in the Bergen County Jail in which he asked her to remember that he had brought her home at 2:30 a. m. on June 17. Anna Brown, Catherine McGuire's mother, offered similar alibi testimony in 1967, but stated at the 1976 trial that it was untrue.

Although William Hardney did not testify in 1967, he did appear at the second trial. He related a conversation

that he had had with Carter in which the latter asked him to support his story that he left the Nite Spot around 2:30 a. m. on June 17, 1966 with two girls. In fact, Hardney had not seen Carter at that time.

The trial court's conclusion that the verdict was not contrary to the weight of the evidence is well-founded. It is highly unlikely that more than one white 1966 Dodge with New York license plates was roaming around this area in Paterson about 2:30 on a Friday morning. The identification of the car by Valentine and Bello, related to the police at the time, was strong evidence that the killers drove away in that car after committing the murders. Carter and Artis were picked up in that car within thirty minutes after the shooting, and Carter admitted that no one else had used the car that night. The bullet found in the car matched the caliber discovered at the scene. There was also "consciousness of guilt" evidence in the solicitation of false testimony, as well as the identification by Bello, and evidence of motive discussed herein. The jury could and did reasonably arrive at its conclusion.

II

Evidence of Racial Motive

At the pretrial conference held a month prior to the retrial, the State advised that it would offer evidence to show that the motive for the murder was revenge for the killing earlier that evening of a black bar owner, Leroy Holloway. At the first trial, the defense had argued that the State had not established any reason for Carter and Artis to have committed the murders. Now the prosecution was prepared to advance evidence to demonstrate their motive.

It is well established that the prosecution may introduce evidence of motive. *See* 1 *Wigmore, Evidence,* (3d ed. 1940), § 118 at 558–59; 1 *Wharton, Criminal Evidence* (13th ed. 1972), § 170 at 314–15. Its purpose is to aid the jury,

particularly in a case resting upon circumstantial evidence, in determining who the person was who committed the crime.

A wide range is permitted with respect to the nature of the evidence that may be introduced. Wharton expressed this thought:

> In the introduction of evidence to show motive, a wide range is permitted. Thus, any evidence which logically tends to show a motive, or which fairly tends to explain the conduct of the accused, should be permitted. In order for evidence of motive to be admissible, it is not necessary that each part of it be sufficient to prove the motive. The facts supplying a motive may be adduced in connection with other evidence in the case. [1] *Wharton, Criminal Evidence, supra,* § 170 at 316-18]

We have adhered to this doctrine. In *State v. Rogers,* 19 *N.J.* 218, 116 *A.*2d 37 (1955), the prosecution's introduction of evidence to show that the defendant had been indebted to the murder victim and was motivated at least in part by a desire to wipe out these loan obligations was permitted. Justice Wachenfeld, writing for a unanimous court, approved. He wrote:

> In criminal prosecutions, whenever the motive or the intent of the accused is important and material, a somewhat wider range of evidence is permitted in showing such motive or intent than is allowed in the support of other issues. . . . Otherwise there would often be no means to reach and disclose the secret design or purpose of the act charged in which the very gist of the offense may consist. Such intent or motive may be proved either by direct or circumstantial evidence. All evidentiary circumstances which are relevant to or tend to shed light on the motive or intent of the defendant or which tend fairly to explain his actions are admissible in evidence against

> him although they may have occurred previous to the commission of the offense. [*Id.* at 228, 116 A.2d 37]

Our courts have continued to follow *Rogers*. *See State v. Baldwin*, 47 *N.J.* 379, 391, 221 *A.*2d 199 (1966) (evidence that defendant killed victim to silence him as a prospective witness held proper); *State v. Royster*, 57 *N.J.* 472, 484-85, 273 *A.*2d 574 (1971) (evidence that defendant threatened victim several weeks before murder permitted). This is the majority rule throughout the country. See 22A *C.J.S. Criminal Law* § 614 (1961 & Supp. 1982); 29 *Am.Jur.*2d, *Evidence*, § 363 (1967).

State v. Mathis, 47 *N.J.* 455, 221 *A.*2d 529 (1966), relied upon by the defendants, is not to the contrary. The prosecutor cross-examined the defendant with respect to how much money he had at the time of the murder and when he had last worked. The trial court ruled that it would not permit proof of financial need unless the State would also show that things of value were stolen and that thereafter defendant was affluent. In approving this ruling, Chief Justice Weintraub agreed that evidence of lack of money alone is not sufficient of prove motive because "it would prove too much against too many." *Id.* at 471, 221 *A.*2d 529. Citing *Rogers* approvingly, he stated that "there must be something more than poverty to tie a defendant into a criminal milieu." *Id.* at 472, 221 *A.*2d 529. By analogy the defendants argue that proof they are black and members of a class is not sufficient justification to tie them into the murders. However, the flaw in this position is their failure to acknowledge all the pieces in the pattern of this heinous crime. Defendants' membership in the class was not their only tie to the motive.

Interestingly, racial revenge was first injected into the trial by the defendants when they put in evidence a taped interview of Bello by then Lieutenant Vincent DeSimone, which referred to the belief that the motive for the shootings was 'for the reason of revenge because there had

been a shooting earlier." The defendant had also elicited on cross-examination of Detective LaConte that as part of his investigation of the murders he had been present at the funeral of Leroy Holloway.

Holloway was the bartender and owner of the Waltz Inn, a bar frequented by black patrons and located in a predominantly black neighborhood. The tavern was situated a few blocks away from the Lafayette Bar. About 8:15 p. m. on June 16, 1966, a white man entered the Waltz Inn and killed Holloway with a blast from a shotgun. A little more than six hours later, two black men entered the Lafayette Bar located at the border between black and white areas and, using a shotgun, killed the white bartender and several patrons. This bartender had been known to refuse to serve blacks. There was also evidence that neither the bartender nor the patrons were robbed. There was money on the bar and those killed had money in their wallets when the police arrived.

A series of events between these two crimes lend further support to the relationship between the murder and racial revenge. After Holloway's shooting, part of the local black community became enraged. A crowd gathered outside the Waltz Inn. News of the upset spread. Artis heard about it while on the street. Carter also knew there was going to be "some trouble." Neither of them knew what had provoked the slaying. While in the Nite Spot Carter heard talk of a "shaking" (retaliatory action). Carter and Artis had more than a passing interest because of Eddie Rawls. Rawls, Holloway's stepson, was the bartender at the Nite Spot. Carter, a professional prizefighter, frequented the Nite Spot almost every day and had a special reserved table there known as the "Champ's Corner." Carter and Rawls were "pretty good friends." Artis was very friendly with Rawls.

Holloway died around 10:00 p. m. An agitated Rawls, accompanied by two friends, went to the police station and

demanded to know what was being done about the shooting of his stepfather. Rawls threatened that if the police did not take care of it, they would. Shortly thereafter Carter saw Rawls at the Nite Spot where Carter expressed his condolences to Rawls and they talked about the murder. Then Carter began a search for guns that had been stolen from his training camp. One of the missing guns was a 12-gauge shotgun. Thereafter, Carter and Artis stopped in at several local bars where they continued to hear talk of a shaking. At around 1:00 a. m. Carter again met with Rawls, this time at Ritchie's Hideaway. They remained there for about a half hour. Carter and Artis were later seen back at the Nite Spot which they left at closing time, 2:15 a. m. Approximately fifteen minutes later, two black men entered the Lafayette Bar and Grill, and, without uttering a single word shot and killed the white bartender and patrons.

Rawls was seen in the group that gathered at the Lafayette Bar after the shootings at about 3:00 a. m. After Carter and Artis were charged with the murder, Rawls assisted in bringing "alibi" witnesses to defense counsel to be interviewed. Several of these witnesses later testified at the retrial that their alibi testimony in 1967 had been fabricated.

Defendants contend that the evidence introduced in support of the racial revenge theory was not probative of defendants' guilt and, secondly, even if it were found to be probative, it was too prejudicial to be admitted. Moreover, in their petition to this Court, defendants stress that the State's summation improperly injected racial prejudice into the jury's consideration. For the reasons that follow, we reject each of these claims.

Defense counsel err when they insist that the State's theory impermissibly casts all blacks as being motivated to seek retribution when a black person is murdered by a white person. There is no place in the courtroom for

any such group labelling. The evidence offered by the State against Carter and Artis was admissible not because they are blacks, but because they were members of the particular local community involved and had a special relationship to Holloway through his stepson Rawls. Artis was a good friend of Rawls and Carter was well acquainted with him. Fueled by the racial overtone, the defendants may have been motivated to avenge the death of Rawls' stepfather. At least it was for the jury to decide whether, under these circumstances, Carter and Artis's relationship to Rawls could impel them to retaliate for one murder by randomly killing others. *See State v. Rogers,* 19 *N.J.* at 230, 116 *A.*2d 37 (any circumstance may be put in evidence that tends to make the proposition at issue either more or less probable); 1 *Wigmore, supra,* § 118 (test of relevance is whether the evidence offered tends to prove the emotion alleged by the prosecution to be present).

The defendants claim that irrespective of the relevance of the motive evidence, its impact was so inflammatory that the jury was improperly swayed in its deliberations. However, "evidence as to motive is admissible even though it may be prejudicial in the sense that it will arouse or inflame the jury against the defendant." 1 *Wharton, Criminal Evidence, supra,* § 170 at 316. There is nothing inherently wrong with advancing a theory of revenge as a motive for murder, if the facts bear out the theory.

Whether the probative value of the evidence is outweighed by the potential prejudice is a decision left to the discretion of the trial judge. *See Evid.R.* 4, Comment 1. The party seeking to preclude the admission of evidence must convince the court that the factors favoring exclusion substantially outweigh the probative value of the contested evidence. *Cf. State v. Sands,* 76 *N.J.* 127, 386 *A.*2d 378 (1978) (whether prior convictions may be excluded as too prejudicial). On appellate review, the decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding

was so wide of the mark that a manifest denial of justice resulted. *See State v. Rogers,* 19 *N.J.* at 229, 116 *A.*2d 37; *Evid.R.* 4, Comment 2.

Here the trial court, having the "feel" of the case and after carefully considering the arguments of both the prosecution and the defense, decided to admit the evidence on motive. The Appellate Division found no abuse of discretion and no manifest denial of justice. We cannot say that on this record the Appellate Division's review of the trial court's action missed the mark so that a new trial is warranted.

Related to the evidentiary argument is the defendants' claim that the State's summation was an unacceptable appeal to racial prejudice, and, as such, violated the defendants' due process rights to a fair trial. The summation must be considered as a whole. The prosecutor's argument tied in the racial aspect of the revenge motive and constituted proper comment. Moreover, we note that defendants' objection to this part of the summation was not directed to the comment concerning motive, but to the analogy of the antipathy between citizens of different countries as "things outside this courtroom" Defendants have not established a case of plain error, the applicable standard under these circumstances. *State v. Thornton,* 38 *N.J.* 380, 396, 185 *A.*2d 9 (1962), *cert. denied,* 374 *U.S.* 816, 83 *S.Ct.* 1710, 10 *L.Ed.*2d 1039 (1963).

The defendants rely on a number of cases to show that the prosecutor's argument constituted an improper appeal to racial prejudice. We find those cases inapposite. In *McFarland v. Smith,* 611 *F.2d* 414 (2d Cir. 1979), the prosecutor urged the jury to credit a police officer's testimony because the probability of truthfulness was increased when one black person testified against another. The court held the remarks improper. As Judge Newman explained in that opinion, this notion, in the absence of any support in the evidence for the underlying assumption,

is illogical because it is not probative of the likelihood that accusing testimony by someone within the same group is more credible than accusing testimony between people of different groups. *See Id.* at 418. Here, the prosecutor's argument is logical; it attempts to make the racial revenge theory more credible by demonstrating how ethnic prejudice may cause people to engage in senseless acts.

In *Withers v. United States,* 602 *F.*2d 124, 126 (6th Cir. 1979), the court found that a prosecutor's argument that not one white person had supported the defendant's story was improper. Similarly, in *United States ex rel. Haynes v. McKendrick,* 481 *F.*2d 152, 155, 160 (2d Cir. 1973), the court found that repeated, derogatory group references to blacks—"their" intelligence, "their" sexual promiscuity, "their" manner of dress—constituted a violation of defendant's right under the due process clause to a fair trial.

Here, despite the defendants' repeated protestations in their briefs and appellate oral arguments to the contrary, the prosecutor's advocacy attributed no qualities to a generalized class of blacks. The prosecutor did not ask the jury to believe that blacks in general possess an instinct to commit senseless violence that would lead any one of them to murder whites. Rather, he urged them to find that these two particular black men, Carter and Artis, committed the Lafayette Bar murders in retaliation for the slaying of a friend's stepfather. His remarks were not tangential asides to the jury designed to arouse latent racial hostility, *see Kelly v. Stone,* 514 *F.*2d 18, 19 (9th Cir. 1975), but were directed to one element of the State's case. "When a prosecutor's summation includes remarks in an effort to persuade a jury to return a guilty verdict, the resulting conviction is constitutionally unfair *unless the remarks are abundantly justified.*" *McFarland v. Smith,* 611 *F.*2d at 416–17 (emphasis added). We find that the argument set out in this case is justifiable because it was

relevant to the issue of motive, there being evidence in the record to support that proposition.

III

Brady Violation

Defendants claim that they are entitled to a new trial because the prosecution withheld material evidence favorable to them, in violation of *Brady v. Maryland*, 373 *U.S.* 83, 83 *S.Ct.* 1194, 10 *L.Ed.*2d 215 (1963). Because the record before us on this point was inadequate to support final appellate resolution, the matter was remanded to the trial court for a full evidentiary hearing. 85 *N.J.* at 303, 426 *A.*2d 501.

At issue on remand was the prosecution's alleged suppression of information concerning an August 7, 1976 polygraph examination of Alfred Bello. The test was arranged by Passaic County Prosecutor Burrell Ives Humphreys, who wanted to evaluate, prior to the retrial, the credibility of Bello's 1967 trial testimony. He arranged for examinations by two polygraphers, Richard Arther and Leonard Harrelson. Arther concluded that Bello was truthful when he said that he believed that Carter was in the bar when the shootings took place; that Bello was on the street just after the shootings and saw Carter there; and that Bello was the first person to go inside the bar after the shootings.

According to Professor Harrelson's written report of the test, which was furnished to defense counsel, it was his opinion that Bello's testimony at the 1967 trial was true, and that the statement recanting his original statement was not true. The defense was unaware, however, that after the test, but before he submitted his written report, Professor Harrelson told Chief DeSimone that Bello was truthful when he said he was *inside* the Lafayette Bar prior to and at the time of the shootings. Since the 1967 trial testimony put Bello *outside* the Lafayette Bar at the

time of the shootings, there was a serious discrepancy between Harrelson's written report, which affirmed that testimony, and his oral comments, which contradicted it.[1] The prosecution's failure to disclose Professor Harrelson's oral report to the defense forms the basis of the claimed *Brady* violation.

On the remand the trial court was instructed to make a threshold finding regarding the prosecution's knowledge of the ambiguity contained in Harrelson's report. The court was further to assess the suppressed information in the light of the requirements for finding a *Brady* violation. Finally, the court was to determine whether, even in the absence of a *Brady* violation, the information acquired by the defense since trial qualified as newly discovered evidence entitling the defendants to a new trial.

A hearing was held before Judge Leopizzi from May 18, 1981 to June 8, 1981. The court heard the testimony of Bello, Harrelson, Humphreys, Assistant Prosecutors Martin Kayne and Ronald Marmo, other employees in the Passaic County Prosecutor's Office during the period in question, and defense attorneys Myron Beldock and Lewis Steel. In an 80 page opinion Judge Leopizzi made detailed findings of fact, and concluded that although the prosecution "technically" failed to turn over information regarding Harrelson's oral report, that failure was justified in the circumstances. The court further found that the suppressed information was not material evidence favorable to the defense, within the meaning of *Brady v. Maryland,* nor did it meet the test established to determine if newly discovered evidence warrants a new trial. Although

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[1] The conflict between Harrelson's written report and his oral statement apparently arose because Harrelson never read Bello's testimony and so was unaware that at the first trial Bello had said he was outside the bar when the shootings occurred. Thus, when Bello told Harrelson that he was inside the bar, Harrelson assumed that Bello was repeating the version to which he had testified at the first trial.

we consider that Harrelson's oral report of the polygraph test should have been revealed to the defense, we agree that a new trial is not warranted under either *Brady* or the newly discovered evidence test.

The rule established in *Brady v. Maryland, supra,* and its progeny provides that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. [373 *U.S.* at 87, 83 *S.Ct.* at 1186, 10 *L.Ed.*2d at 218]

The *Brady* rule is invoked where information is discovered after trial "which had been known to the prosecution but unknown to the defense." *United States v. Agurs,* 427 U.S. 97, 103, 96 *S.Ct.* 2392, 2397, 49 *L.Ed.*2d 342, 349 (1976). The prosecutor is charged with knowledge of evidence in his file, "even if he has actually overlooked it." *Id.* at 110, 96 *S.Ct.* at 2400, 49 *L.Ed.*2d at 352. Evidence impeaching the testimony of a government witness falls within the *Brady* rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence. *Giglio v. United States,* 405 U.S. 150, 92 *S.Ct.* 763, 31 *L.Ed.*2d 104 (1972); *United States ex rel. Marzeno v. Gengler,* 574 F.2d 730 (3d Cir. 1978); *United States v. Dansker,* 565 *F.*2d 1262 (3d Cir. 1977), *cert.* dismissed, 434 *U.S.* 1052, 98 *S.Ct.* 905, 54 *L.Ed.*2d 805 (1978). This Court has observed that the State's obligation to disclose is "not limited to evidence that affirmatively tends to establish a defendant's innocence but would include any information material and favorable to a defendant's cause even where the evidence concerns only the credibility of a State's witness." State v. Carter, 69 *N.J.* at 433, 354 *A.*2d 627.

It is undisputed that Harrelson's oral report was known to the prosecution but unknown to the defense. Chief Assistant Prosecutor Kayne testified that after the test, Har-

relson told Chief DeSimone that Bello had been in the bar at the time of the shootings. Prosecutor Humphreys was informed by his staff of Harrelson's conclusion and he discussed the matter with Harrelson in a lengthy telephone conversation. Although the prosecution claims that Harrelson's oral report was so preliminary and tentative as to be beyond the scope of discovery, Harrelson himself testified that he did not at any time indicate that his oral report was preliminary or that he was unsure of the accuracy of the results. The prosecution nevertheless contends that the written report was accepted in good faith as accurate, complete and definite, and that it was justified in thinking that the written report superseded any oral comments.

We accept the trial court's finding that the oral report was not preliminary and that the defense failed to prove that the prosecution intentionally misrepresented the results of the polygraph test, or attempted to manipulate Harrelson and dictate the contents of his final report. In determining whether prosecutorial nondisclosure violates due process, the good faith or bad faith of the prosecution is irrelevant. *Brady v. Maryland,* 373 *U.S.* at 87, 83 *S.Ct.* at 1197, 10 *L.E.*2d at 218. Ordinarily such a report should have been disclosed to the defendants. However, there remains for consideration whether this undisclosed information was "material" to the defense, so that the defendants were denied due process and a fair trial.

Nondisclosure of evidence favorable to the accused violates the constitutional right of due process only "where the evidence is material to guilt or punishment." *Id.* at 87, 83 *S.Ct.* at 1197, 10 *L.Ed.*2d at 218. In making the often difficult determination of what is "material" we look to the factual circumstances of the particular case. Where the prosecution has knowingly used perjured testimony, the undisclosed information is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,*

427 *U.S.* at 103-04, 96 *S.Ct.* at 2397, 49 *L.Ed.*2d at 349-50. Where the defendant has made a specific request for information and the prosecution has failed to reveal the requested information, the standard of materiality is whether "the suppressed evidence might have affected the outcome of the trial." *Id.* at 104, 96 *S.Ct.* at 2398, 49 *L.E.*2d at 350. Finally, when no request is made by the defendant or only a general request is made, information not revealed by the prosecutor will be considered material only if "the omitted evidence creates a reasonable doubt that did not otherwise exist. . . ." *Id.* at 112, 96 *S.Ct.* at 2401, 49 *L.Ed.*2d at 355.

In this case it is undisputed that the defense requested all information concerning Bello's polygraph. The test of materiality, then, is whether knowledge of the suppressed oral report might have affected the outcome of the trial.

The "might have affected the outcome of the trial" test is not translatable into the mere possibility that the undisclosed information might have helped the defense. Otherwise, the test would call for automatic reversal.[2] There must be a real possibility that the evidence would have affected the result. This becomes apparent when it is realized that the "might have affected the outcome" criterion is the intermediate standard in the *Brady* sliding scale. The most stringent standard to be applied, when the prosecutor uses perjured testimony, is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." The least stringent standard is whether the undisclosed evidence would create a "reasonable doubt that did not otherwise exist." Arguably, then, under the "might have affected the outcome" test, the

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[2] Though the common law required reversal for any error, that rule was rejected many years ago. See *R.* 2:10-2; *Fed.R.Crim.P.* 52(a).

defendant must show more than a reasonable likelihood that the evidence could have changed the jury verdict.[3]

Some federal courts have held that the "might have affected the outcome" test is synonymous with harmless error. *United States v. Goldberg,* 582 *F.*2d 483–89 (9th Cir. 1978), *cert. denied,* 440 *U.S.* 973, 99 *S.Ct.* 1538, 59 *L.Ed.*2d 790 (1979). *See also Chavis v. North Carolina,* 637 *F.*2d 213, 223 (4th Cir. 1980). The harmless error test explicated by the federal courts is whether the error was harmless beyond a reasonable doubt, namely, whether there was a "reasonable possibility" that the error would have affected the result. *See United States v. Goldberg,* 582 *F.*2d at 489, holding that the standard in *Chapman v. California,* 386 *U.S.* 18, 87 *S.Ct.* 824, 17 *L.Ed.*2d 705 (1967), of " 'harmless beyond a reasonable doubt' requires a new trial whenever there is a reasonable possibility that the error materially affected the verdict." There must be a real possibility that the defendant was denied a fair trial. We choose to apply the harmless error criterion.[4] In doing so,

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[3] Judge Lacey in *United States v. Dansker,* 449 *F.Supp.* 1057 (D.N.J.1977), remanded for evidentiary hearing, 565 *F.*2d 1262 (3d Cir. 1977), *cert.* dismissed, 434 *U.S.* 1052, 98 *S.Ct.* 905, 54 *L.Ed.*2d 805 (1978), argues that the test on failure to respond to a specific request is whether there is any reasonable likelihood that production of the omitted evidence could have affected the jury's verdict.

[4] Chief Justice Weintraub in *State v. Macon,* 57 *N.J.* 325, 273 *A.*2d 1 (1971), discussed the *Chapman* test in the following analysis:

> No matter how a test may be stated, the question whether an error is reason for reversal depends finally upon some degree of possibility that it led to an unjust verdict. We say "possibility" and not "certainty," for if it were certain that the error led to an unjust result, the reviewing court would be constrained to order the just result, which, on that hypothesis, would be an acquittal, except in the unusual case in which it could be said the error prevented the trier of facts from even reaching the merits. So, too, a "probability" that the error resulted in a false verdict should, if it were the standard for intervention, drive the appellate court to order the judgment which the jury "probably" would have

we must be mindful that we are reviewing the trial court's decision that the nondisclosure of Harrelson's oral report "in no way would or could have affected the outcome" of the trial.

Evidence that is merely cumulative does not create a reasonable possibility that the verdict would have been affected. In *Goldberg* the government's case consisted primarily of the testimony of Newman, a fellow employee. The prosecutor had failed to respond to a specific request for production of Newman's notes, which could have been used to illustrate Newman's cooperation with the government in the hope of receiving lenient treatment. The court held that this evidence was merely cumulative and not material to the issue of guilt. Therefore, there was "no reasonable possibility that . . . use [of the notes] at trial would have had a material effect on the verdict." 582 *F.*2d at 490.

In *DeMartino v. Weidenburner,* 616 *F.*2d 708 (3d Cir. 1980), the defendant had been found guilty of accepting a $3,000 bribe as chairman of the municipal Alcoholic Beverage Commission. The defense was that the tavern owner paid the money to the defendant who was to use the funds to obtain a lawyer to represent the owner on a gambling charge, it being alleged that the gambling occurred at the tavern. Despite noncompliance with a specific request for certain documents, Judge Higginbotham pointed out that some of the documents were not material because the evidence was cumulative. He quoted from *United States ex rel. Marzeno v. Gengler,* 574 *F.*2d 730, 735 (3d Cir. 1978):

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reached but for that error. And since a reviewing court could rarely say an error either certainly or probably induced a false verdict, either test would disadvantage a defendant. Defendants fare better if a new trial may be ordered upon a "possibility" of injustice. Still, not "any" possibility can be enough for a rerun of the trial. The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached. [*Id.* at 335-36, 273 *A.*2d 1]

> A conviction need not be vacated because evidence that is 'merely repetitious' or 'cumulative' has not been revealed to the defendant.

In *Zeigler v. Callahan*, 659 *F.*2d 254 (1st Cir. 1981), the alleged *Brady* violation concerned evidence that could have been used to impeach the credibility of a government witness. The court held that the evidence was cumulative and not material, the witness's credibility having been fully explored on cross-examination by competent counsel. The court wrote:

> Where [the omitted evidence] is merely cumulative, however, courts generally reject the contention that such evidence is material. *See Giles v. Maryland*, 386 *U.S.* 66, 98, 87 *S.Ct.* 793, 809, 17 *L.Ed.*2d 737 (1967) (Fortas, J., concurring); *United States v. Imbruglia*, 617 *F.*2d [1] at 7; *United States v. Shelton*, 588 *F.*2d 1242, 1248 (9th Cir. 1978), *cert. denied*, 442 *U.S.* 909, 99 *S.Ct.* 2822, 61 *L.Ed.*2d 275 (1979). This is true even where there has been a specific defense request for the information, *see DeMartino v. Weidenburner*, 616 *F.*2d 708, 710–13 (3d Cir. 1980), and the information, if disclosed, could have been used to impeach a "key" prosecution witness, *see United States v. Previte*, 648 *F.*2d [73] at 85; *United States v. Goldberg*, 582 *F.*2d 483, 490 (9th Cir. 1978), *cert.* denied, 440 *U.S.* 973, 99 *S.Ct.* 1538, 59 *L.Ed.*2d 790 (1979) (prior history omitted); *Lewinski v. Ristaino*, 448 *F.Supp.* 690, 694–96 (D.Mass.1978), so long as the defense had an adequate opportunity to impeach the witness by other means.
>
> Although Lincoln's credibility was not the most critical issue in this case, his credibility was thoroughly impeached on cross-examination by competent counsel. The information contained in the undisclosed statements did not relate to the substance of Lincoln's testimony. It was merely cumulative impeachment evi-

> dence and much of it was obviously known to defense counsel prior to trial, as it was extensively covered on cross-examination and in argument. Under these circumstances, even assuming the defense request for the statements was sufficiently specific to trigger the more rigorous standard of materiality set forth in *Agurs*, 427 *U.S.* at 104, 96 *S.Ct.* at 2397, we cannot say that the statements might have affected the outcome of the trial. [*Id.* at 266–67]

The defense claims it could have used knowledge of the polygraph results not only to directly impeach Bello's testimony, but to show that the return to his 1967 trial testimony was prompted by the State's misrepresentation of the polygraph results. Thus, Bello would have been shown to be an extremely malleable witness whose testimony was manipulated by the State.

Had the defense used its knowledge of the Harrelson polygraph test to impeach Bello, however, the results of the test would surely have come to the attention of the jury. Both attorneys for defendants testified at the hearing on remand that had the oral report been disclosed, they would have brought out the polygraph examination and its results at trial. Although polygraph evidence is ordinarily not admissible in criminal cases, an exception occurs when the State and the defendant enter into a stipulation to introduce the results in evidence. *See State v. McDavitt*, 62 *N.J.* 36, 297 *A.*2d 849 (1972); *State v. Christopher*, 149 *N.J. Super.* 269, 373 *A.*2d 705 (App.Div.1977). The State would presumably have entered into such a stipulation, since it contends that evidence associated with Harrelson's examination of Bello would have added great strength to the State's case.[5]

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[5] The Assistant Prosecutor stated at oral argument that the State would not have opposed the use of the polygraph test.

The Harrelson test results, if laid before the jury, would have established that an eminent polygrapher entertained "no doubt at all" that Bello was truthful when he identified the defendants as the murderers. Harrelson testified at the remand hearing that it was his opinion, based on the Bello polygraph examination, that Carter and Artis alone were responsible for the shootings at the Lafayette Bar. Harrelson explicitly asked Bello, during the course of the examination, whether he had seen two men inside the bar with guns. Bello answered no. Asked if he had seen Carter and Artis outside the Lafayette Bar with weapons, Bello answered yes. Based on his analysis of Bello's responses, Harrelson concluded that there were no others involved. The test results thus lend no support to Bello's previous "in-the-bar" narratives, given to Assemblyman Hawkins and to an Essex County Grand Jury in 1975. In those stories Bello was inside the bar when two men—*not* Carter and Artis—entered through the side door and began shooting. Carter and Artis were seen in the vicinity of the bar with weapons. Had he been called as a witness at defendants' trial, Harrelson would have testified "that Mr. Bello was telling the truth when he identified Carter and Artis as the murderers." The Harrelson test results varied from the trial testimony only in terms of *where Bello was at the time of the shootings;* in both versions Carter and Artis were seen with weapons outside the bar; in neither version did Bello witness the shootings.

In deciding whether the Harrelson test results might have affected the outcome of the case, we must weigh the value of further impeaching Bello against the strongly inculpatory nature of the test results and Harrelson testimony. Bello's credibility had been subject to exhaustive attack during the trial and he was questioned at length regarding his various conflicting stories. The defense's cross-examination of Bello occupied the better part of five days and covers 600 transcript pages. The trial court observed: "His credibility was severely and repeatedly as-

sailed from every conceivable angle through the lengthy and extensive cross-examination over a period of several days." He was questioned closely about discrepancies between his trial testimony and previous narrations. He was examined extensively on pressures and coercion by the prosecution to induce him to return to his 1967 trial testimony. His criminal record and his history of blackouts and alcoholism were fully explored. The trial court found:

> The jury was fully aware of Bello's criminal background and other unlawful activities. He was portrayed before the jury as a perjurer, liar and thief. Certainly the cross-examination of these experienced lawyers had not portrayed Bello as a person of integrity and honesty. Despite this, Bello left the stand unshaken as to identification of the defendants.

Given the length and scope of the defense's attack on Bello's testimony, there is no reasonable likelihood that further impeaching evidence would have affected the outcome of the trial. The added inconsistency that Bello told Harrelson that he was in the bar was merely cumulative.

This is particularly so in view of the wealth of other evidence amassed against the defendants. Bello's testimony that he saw Carter and Artis outside the bar immediately after the shootings did not stand alone. A substantial portion of his testimony was strongly supported by Mrs. Valentine. It is undisputed that Bello was at the Lafayette Bar immediately after the shootings. Immediately after the gunshots, Mrs. Valentine had paused only to look out the window before throwing on a raincoat and running downstairs to the tavern. Bello was at the door when she arrived. It was Bello who flagged down a police car. Bello's testimony that he saw a white car with out-of-state license plates and distinctive triangular tail-lights was likewise corroborated by Mrs. Valentine's independent testimony. Mrs. Valentine also saw two black men run to a car of that description and drive away. Both Bello and Mrs. Valentine

gave comparable descriptions of the car to the police. When Carter's car was brought to the Lafayette Bar shortly afterward, both Bello and Mrs. Valentine identified it as the car they had seen leaving the scene.

In addition to this eyewitness testimony, defendants were implicated by considerable circumstantial evidence. The Carter-Artis car was seen in the vicinity of the Lafayette Bar within minutes of the shootings. In the car were found a shotgun shell and a .32 caliber shell, both of the same kind as the spent shells found at the murder scene. A motive for the killings—revenge for the murder of Leroy Holloway—was adequately established. Finally, consciousness of guilt was suggested by Carter's solicitation of false alibi testimony. Given the weight of the evidence accumulated against the defendants, further impeachment of Bello on a point not central to his identification of them would not have been material to the outcome.

Although we hold that the prosecution's failure to disclose the Harrelson oral report was not constitutional error, it is the better practice, where the materiality of the requested information is in issue, either to furnish the information or to submit the matter to the trial court. In discussing the prosecutor's duty to voluntarily submit information, the Supreme Court in *Agurs* counseled prosecutors to err on the side of disclosure.

> Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. [427 *U.S.* at 108, 96 *S.Ct.* at 2399, 49 *L.Ed.*2d at 352]

That advice has equal application here. The prosecutor could not have known, prior to the development of the complete record at trial, what significance the oral report might have. Since the oral report certainly fell within the

scope of requested information, it should have been disclosed to the defense along with Harrelson's written report.

We had also directed the trial court on remand to explore "precisely what use the prosecution made of Harrelson's report in confronting Bello" prior to the second trial. 85 *N.J.* at 315, 426 *A.*2d 501. The trial court made the following findings:

> (13) The prosecution did not cause Bello to recant his recantation through coercion, deceit, or threats of prosecution for perjury; nor did the State misrepresent to Bello the results of the polygraph test to get Bello to go back to the "on the street" version;
>
> (14) Bello recanted the recantation when he told Harrelson during the polygraph pre-test interview that Raab, Hogan and Levinson pressured him into recanting the 1967 trial testimony. . . .

Those findings are supported fully by the record. *See State v. Johnson,* 42 *N.J.* 146, 162–64, 199 *A.*2d 809 (1964). Kayne and DeSimone were the first persons who interviewed Bello after receipt of the Harrelson report. At that time Bello had already disclosed to Harrelson that the recantation of his 1967 trial testimony was not true. It was not the State's misuse of the polygraph test that caused Bello to revert back to his 1967 trial testimony. Neither Kayne nor DeSimone used the polygraph test to coerce or deceive Bello for the purpose of having him switch back to the "on the street version."

The dissent contends that the trial court erred in finding that the Harrelson report was not used to get Bello to go back to his 1967 trial testimony. It bases this contention on Assistant Prosecutor Marmo's testimony and the letter written by Prosecutor Humphreys to Attorney General Hyland. Marmo's testimony and the prosecutor's letter in-

dicate that Bello, when faced with the Harrelson report, admitted that the Essex County story was untrue. The part of the Harrelson polygraph report used for this purpose, contrary to the position expressed by the dissent, was true and accurate. In the Essex County in-the-bar version, Bello saw two men, not Carter and Artis, enter the tavern and start shooting, and he saw Carter and Artis in the vicinity of the bar. In the Harrelson version Bello was inside, but did not witness the shooting; he did, however see Carter and Artis outside the bar with weapons immediately after the shooting. No reference was made to any other persons. The significance of the Essex County in-the-bar version was that two other persons had committed the murders. The Harrelson report and the 1967 trial testimony, on the other hand, agreed that only Carter and Artis were on the scene. Marmo's testimony and the Humphreys letter do not undercut the trial court's finding that the State did not misrepresent the results of the polygraph test to get Bello to return to the 1967 trial testimony. Thus, the dissent's reliance on Marmo's testimony and the Humphreys letter is misplaced. Moreover, there was no inconsistency, as the dissent claims, between the reports of the polygraphers Harrelson and Arther; both concluded that Bello saw Carter and Artis outside the bar after the shootings.

IV

Newly Discovered Evidence

Defendants contend that they are entitled to a new trial because the information that has come to light concerning Harrelson's oral report constitutes newly discovered evidence. Before a defendant is entitled to a new trial on this ground, it must be established that the new evidence is "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's

verdict if a new trial were granted." *State v. Carter,* 85 N.J. at 314, 426 *A.*2d 501. See *R.* 4:50—1(b). All three tests must be met before the evidence can justify a new trial. *State v. Johnson,* 34 *N.J.* 212, 223, 168 *A.*2d (1961). Defendants have failed to satisfy any of these tests.

For the reasons outlined in our discussion of the *Brady* violation, we hold that the evidence of Harrelson's oral report is neither material nor of the sort that would lead to a change in the jury's verdict. Further, we agree with the trial court that the evidence could have been discovered before or during trial through the exercise of reasonable diligence. On September 14, 1976, 27 days prior to trial, Harrelson's written report was turned over to the defense. The report included a long narrative, the product of the pre-test interview, in which Bello described what happened inside the bar at the time of the shootings. The test report also included the specific test questions that Harrelson asked, and Bello's responses. To the questions, "Were you inside the Lafayette Lounge as you say?", "Were you inside the lounge when you heard the shots?" and "Were you inside the bar when you heard the shots?", Bello answered yes. In view of Harrelson's conclusion that Bello's 1967 testimony was true, Bello's narration and the answers to the test questions should have alerted a careful defense attorney to the need to investigate the Harrelson report further.

This is particularly so since defense attorneys were aware of an article that appeared in the *New York Daily News* on September 1, 1976, which referred to "the inability of key witnesses to pass lie tests on their testimony that Carter and Artis actually committed the killings." Artis's counsel referred to this article during the September 8, 1976 argument on a motion for change of venue and dismissal of the indictment. He noted that the article contained specific information about the Bello test. As the trial court observed in its opinion after remand, the *Daily News* article coupled with the seemingly inconsistent writ-

ten report of Bello's polygraph test were sufficient to alert the defense to the need to investigate further.

V

Improperly Admitted Evidence

Carter, while incarcerated, had written letters to two prospective alibi witnesses. The trial court ruled these letters were inadmissible when the State could not establish how or when it obtained them. Though it found the letters were obtained in violation of the Fourth Amendment, the trial court permitted the State to use these letters to refresh the recollection of the witnesses. Defendants claim that testimony predicated on this recollection violated the exclusionary rule since the prosecution obtained "use" of the evidence despite the constitutional violation. *See Wong Sun v. United States,* 371 *U.S.* 471, 83 *S.Ct.* 407, 9 *L.Ed.*2d 441 (1963).

This rationale ignores the established distinction between a document that is evidential and one used to refresh a witness's recollection. Once a proper foundation has been laid, a witness may examine any document to refresh his memory. The oft-quoted statement of Lord Ellenborough in *Henry v. Lee,* 2 *Chitty* 124, 124 (1814), sets forth the general rule:

> [I]f upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence but the recollection of the witness.

Preliminarily the trial court must decide whether the memorandum does refresh the witness's recollection. It may decline to permit its use where the danger of undue suggestion outweighs the probable value of the evidence. In making this decision the trial court may consider the na-

ture of the memorandum and the witness's testimony, including cross-examination, by which counsel may test the witness's credibility that his memory has been revived. *McCormick, Evidence* (2d ed. 1972), § 9 at 14–19.

The admissible evidence is the recollection of the witness, and not the extrinsic paper. *See Marti v. Standard Fire Insurance Co.*, 127 *N.J.L.* 591, 23 *A.*2d 576 (E. & A. 1942); 3 *Wigmore, Evidence* (Chadbourn rev. ed. 1970), § 758 at 125–28. The test is whether the witness puts before the court his independent recollection and knowledge. *Zimmer v. Westinghouse Electric Corp.*, 26 *N.J.* 339, 351, 139 *A.*2d 754 (1958). This test was met here.

Defendants also argue that the testimony of William Hardney, a friend of Carter, was unreliable because it was the product of illegal conduct by the prosecution and its admission violated their due process rights. William Hardney originally told detectives that he was with Carter at the Nite Spot at the time of the killings. In October 1976 he was questioned by five police officers who came to his house at 1:00 a. m. He could not reach his lawyer, but the police remained and told him they wanted to hear his version of what occurred. Hardney repeated the Carter alibi story.

Thereafter, the police advised Hardney that his wife and he were to be arrested and charged with obstruction of justice. When Hardney was told by his lawyer to tell the truth, he admitted that he had been lying about the Nite Spot story and that he had not been there with Carter on the morning of June 17. Less than a week later, at his lawyer's office, he reiterated the truth to the police. The prosecution's conduct is not to be condoned, but the pressure did not affect the witness's competency. The matter was brought out on cross-examination to challenge the reliability of Hardney's testimony. We find defendants' charge of a due process violation to be wanting.

VI

Bello as a witness

Defendants argue that the State should not have been permitted to use Bello as a witness. The contention is based on several factors. First, Bello was unreliable. He had made seven sworn statements, some of which were inconsistent with each other, he had committed other crimes, and he had received promises of favorable treatment from the State. Second, the prosecutors had "failed to take any steps whatsoever to ensure reliability of Bello's version of events." The argument is without merit.

Evidence Rule 7 provides that "every person is qualified to be a witness" except as otherwise provided in the Rules or by other law of this State. The declared policy is that generally everyone is qualified to be a witness and give relevant evidence. *Germann v. Matriss, 55 N.J.* 193, 216, 260 *A.*2d 825 (1970). Witness disqualification is an exception. *State v. Briley,* 53 *N.J.* 498, 506, 251 *A.*2d 442 (1969). In the absence of a specific rule of exclusion, a witness should be permitted to testify. *Cf. State in Interest of R. R., Jr.,* 79 *N.J.* 97, 398 *A.*2d 76 (1979) (age *per se* does not render a proposed witness incompetent; rather, under *Evid. R.* 17, a court should decide whether a person is incapable of expressing himself or understanding the duty to tell the truth).

Defendants do not point to Bello's conviction of any crimes, but even convictions would not preclude the State from presenting him as a witness. *See State v. Fox,* 12 *N.J.Super.* 132, 139, 79 *A.*2d 76 (App.Div.1951). Moreover, promises from the State and inconsistent statements were properly matters for the jury's consideration. Lastly, the prosecution had acted in good faith to verify before trial Bello's expected testimony. As discussed *supra,* at 139, 79 *A.*2d 76 there was substantial verification of much of Bello's version. The extent to which his testimony was to be believed was for the jury.

VII

Prosecutorial Misconduct

Defendants claim that the prosecutor overstepped the bounds of propriety when he attempted to explain to the jury the apparent discrepancy between the time elapsed and distance traveled by the white car on the first two occasions it was observed by the police. The prosecutor argued:

> Now, the police officers had traveled all the way from Twelfth to Tenth, all the way along there, all the way along here, all the way along Route 4 some distance for New York and all the way back and the defense says well, of course, we couldn't be this speeding white car, couldn't be Carter and Artis because, look, one, two, three, four, five, he had only gone five blocks while the police officers had gone all this distance. Therefore, the speeding white car that they saw was not our car. It was some other car. But, there is one thing that they overlook; Mr. Rawls' house right there. You put this pointer between these two points where Officer Kapter [*sic*] saw the automobile and where Mr. Carter and Artis were stopped and it forms a triangle with Mr. Rawls' house. So simple, really, ladies and gentlemen. There is not two white cars that are speeding along. *There is one car and this white car makes a stop at Mr. Rawls' house. What did they do? They get rid of the hat, get rid of a coat, dump some guns, pick up Mr. Royster.* Maybe they pick up Mr. Royster back here at the Nite Spot as they are coming down East 18th Street and as Officers Nativo or Tanis see them turning onto Twelfth Avenue. [Emphasis added]

Defendants claim that the prosecutor presented the above italicized statement as a fact. However, these conclusions were inferences that the jury could draw from proven facts.

A prosecutor may comment on the facts shown by or reasonably to be inferred from the evidence. *State v. Farrell*, 61 *N.J.* 99, 102, 293 *A.*2d 176 (1972); *State v. Johnson*, 31 *N.J.* 489, 158 *A.*2d 11 (1960); *State v. Bogen*, 13 *N.J.* 137, 98 *A.*2d 295 (1953). There is no error so long as he confines himself in that fashion. Ultimately it was for the jury to decide whether to draw the inferences the prosecutor urged.

The defense counsel also allege that the prosecution intentionally misled them as to the theory under which Carter and Artis would be tried. The defense claims that the State represented in March 1976 that it would argue that four persons were involved in the shootings: two, not Carter and Artis, did the shooting at the time when Bello was in the bar; and Bello saw Carter and Artis on the street as he fled from the bar.

However, the State never amended the 1966 indictment or its responses to the bill of particulars. By late September 1976, the defense knew that Bello had particulars would stand. On September 27, 1976, Judge Marchese had clarified the bill of particulars to reflect the State's position that Carter and Artis fired the shots that killed the victims and that no other persons fired any shots in the bar.

An intentional, misleading misrepresentation as to the factual theory upon which the State proposes to rely may constitute a basic unfairness where the defendant has relied upon such misrepresentation in preparation of the defense. The Appellate Division in *State v. Laganella*, 144 *N.J.Super.* 268, 365 *A.*2d 224 (App.Div.1976), appeal dismissed, 74 *N.J.* 256, 377 *A.*2d 652 (1976), after emphasizing the absence of evidence of misrepresentation in that case, commented:

> This conclusion eliminates any vice from the State's unwillingness to produce the witness, for it is an unfair representation that offends due process and not

> trial strategy. Clearly the prosecutor of a criminal indictment at trial has wide discretion with respect to the production of proofs. [*Id.* at 280, 365 *A.*2d 224]

In this case there is no evidence of misrepresentation with respect to the theory upon which the State intended to proceed.

Defendants further contend that the prosecutor's remarks in summation about Carter's grand jury testimony violated the right to remain silent. The prosecutor made the following argument about Carter's grand jury testimony:

> [A]nd, of course, there is Mr. Carter's testimony before the Grand Jury which was read to you. There was talk of a shake among certain persons in the black community. There was talk about a retaliation.
>
> Now the defense says well, Mr. Carter wouldn't have said that unless he was uninvolved. Is that so? He is before this Grand Jury. What was it, which Grand Jury? He knows he is being examined. He knows the police aren't that dumb. He knows there is talk of a retaliation and a shake. What is he going to say, there wasn't any? He is going to say yeah, there was talk of retaliation, a shake, but not me. It was going on in the Nite Spot. It was going on in the front of the bar and I was. . . .

The Fifth Amendment, applicable to the States by reason of the Fourteenth Amendment, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California,* 380 *U.S.* 609, 615, 85 *S.Ct.* 1229, 1233, 14 *L.Ed.*2d 106, 110, reh. denied, 381 *U.S.* 957, 85 *S.Ct.* 1797, 14 *L.Ed.*2d 730 (1965); *State v. Lanzo,* 44 *N.J.* 560, 210 *A.*2D 613 (1965). The prosecutor may, however, comment on the evidence in the record and argue about the significance of the testimony introduced at the

trial. *State v. Sinclair,* 49 *N.J.* 525, 548, 231 *A.*2d 565 (1967). In doing so, the prosecutor must clearly avoid reflecting upon a defendant's Fifth Amendment right to remain silent.

Here Carter's grand jury testimony had been read to the jury and the prosecutor's comment was a fair evaluation of that testimony. No objection was made at trial that this comment violated defendant's right to remain silent and we fail to discern how this comment violated any such right. The prosecutor also referred to the failure to produce evidence that an insurance claim had been made by Carter for some stolen guns. However, production of that evidence would not have required calling Carter, and therefore there was no violation of his right to remain silent.

The defendants also assert that the prosecutor's comments on the defendants' failure to produce certain witnesses—Rawls, Richard Solomon and Stanley Van Ness—was improper. *State v. Clawans,* 38 *N.J.* 162, 183 *A.*2d 77 (1962), sets forth the guidelines concerning inferences that may be drawn from failure to produce a witness. It must appear that the person was within the power of the party to produce and that his testimony would have been superior to that already utilized in respect to the fact to be proved. *Id.* at 171, 183 *A.*2d 77. It has been said that failure to call a witness available to both parties precludes raising an inference against either. *O'Neil v. Bilotta,* 18 *N.J.Super.* 82, 86, 86 *A.*2d 705 (App. Div.), aff'd, 10 *N.J.* 308, 91 *A.*2d 231 (1952). However, that statement may not necessarily be true. Where one party has superior knowledge of the identity of a witness or of what testimony might be expected or where a certain relationship, such as employer-employee, exists between the witness and a party, the adverse inference may properly be argued to the jury. In *Clawans* we pointed out that if the trial court were requested to make such a charge, counsel should make that request out of the presence of the jury at the

close of the adversary's case. The court could then be advised of and consider all the circumstances before deciding whether the request is proper. 38 *N.J.* at 172, 183 *A.*2d 77. The same practice should be followed if comments are to be made in summation. It is only after all the particulars are disclosed that the trial court may properly determine whether the inference should be urged in summation.

Each of the witnesses not produced here could have provided testimony superior to that adduced on the particular matter. Generally the material referred to was of a minor character. The reference to Van Ness arose during the testimony of Fred Hogan, an investigator in the Public Defender's office. He had played a part in obtaining Bello's recantation statement. There was conflicting evidence concerning Hogan's motivation, it appearing that he was to share in the proceeds of a book to be written. Hogan testified that Van Ness, the Public Defender, knew some facts that would support his version. The prosecutor said:

> Where was Mr. Van Ness? He wasn't called by the defendant. [Hogan] said he told other people about this. Where are the other people? They weren't called by the defendants.

Referring to the same subject, the prosecutor also argued:

> Mr. Solomon, where is he in this court-room? . . . He has the movie rights to Mr. Carter's book. Where is he to discuss what he did in this investigation? Why didn't the defense put him on the stand?

The defense did not object to either of these suggested adverse inferences advanced by the prosecutor. If they had objected and stated their reasons, the trial court would have been in a position to judge whether the objections were sound. We do not find that the failure to have explored the defendants' explanation for nonproduction of

these witnesses constitutes plain error. *See State v. Melvin*, 67 *N.J.* 1, 18–19, 319 *A.*2d 450 (1974).

The third comment about which the defendants complain was the prosecutor's charge that the defendants did not produce Rawls. Defense counsel's objection was sustained and the jury immediately instructed to disregard the statement. Any error was cured by the trial court's limiting instruction.

VIII

Juror Misconduct

The defendants contend that a number of jurors were biased or had been exposed to racially prejudicial remarks during the retrial. Defendants also claimed that some jurors had been informed of negative results of lie detector tests taken by the defendants. The trial court held extensive hearings on these charges and made detailed findings leading to the conclusion that the defendants' charges were unfounded. We agree with the Appellate Division that the trail court's findings of fact and conclusions of law dismissing defendants' claims are fully supportable.

IX

In-Court Identification of Artis

Artis claims that the identification evidence linking him to the crime was impermissibly suggestive and inadmissible. "[R]eliability is the linchpin in determining the admissibility of identification testimony. . . ." *Manson v. Brathwaite*, 432 *U.S.* 98, 114, 97 *S.Ct.* 2243, 2253, 53 *L.Ed.*2d 140, 154 (1977). That entails a measurement of the "totality of the circumstances" and consideration of factors such as "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the

witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 *U.S.* 188, 199, 93 *S.Ct.* 375, 382, 34 *L.Ed.*2d 401, 411 (1972).

Here, Artis objects to his police escort to the scene shortly after the crime. Far from being conducive to misidentification, confrontation immediately after a crime promotes fairness to the accused by allowing a viewing while the witness's mental image of the perpetrator is still fresh. *Stewart v. United States*, 418 *F.*2d 1110, 1113 (D.C.Cir.1969). See *also State v. Wilkerson*, 60 *N.J.* 452, 461-62, 291 *A.*2d 8 (1972); *United States ex rel. Gomes v. New Jersey*, 464 *F.*2d 686, 688 (3d Cir. 1972). Artis also questions the interview that Bello had with then Lieutenant DeSimone on October 11, 1966 at which time Bello was shown a photograph of Artis. This objection ignores the fact that Bello never made an identification on the basis of any photographs of the defendants. In fact, Bello said that the photographs did not resemble the defendants. Rather, his identification was based on the opportunity he had to view them at the scene.

Even if bringing the car to the scene was suggestive, the totality of the circumstances indicates that the identification was reliable. Bello had time to view the killers as they walked toward him on a well-lit street. It is likely that he was attentive since he thought the two were detectives and he himself was involved in a crime being committed down the block. His description did not exactly match Artis's appearance. However, Bello maintained that although he could not indicate any particular features, the two men brought to the scene were the same ones he had seen walking down the street. Less than half an hour had elapsed between the time Bello saw the murderers on the street and the time Carter and Artis were brought to the Lafayette Bar.

Defendant's objection goes to the credibility of Bello's identification rather than to any significant due process problems. It is really a challenge that bears on the proper weight to be accorded his testimony. Impeachment of credibility is best dealt with on cross-examination. We find that the identification testimony was properly admitted.

Artis further contends that it was error for the trial court to refuse his requested identification charge. We disagree. Although the court failed to instruct the jury specifically as to the witness's state of mind and opportunity to observe, the charge did include the essential requirements:

> The burden is on the State to prove beyond a reasonable doubt not only that the offense was committed as alleged in the indictment, but also that the defendants are the persons who committed it. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendants before you may convict one or the other or both. If the circumstances of the identification do not convince you beyond a reasonable doubt you must find the defendants not guilty. You must weigh and consider all of the evidence, including contradictions and inconsistencies in the evidence, including the question of identification and the weight to be given such identification, and if after considering and weighing all the evidence you are not satisfied beyond a reasonable doubt that Rubin Carter and/or John Artis have been accurately and been unmistakenly identified as the attackers, you must find them not guilty.
>
> In this case the defendants have denied the charge and claimed that they were not at the scene of the crime at the time of its commission. *The identification testimony is to be received by you with great caution.* [Emphasis added]

If the subject matter is adequately covered in the text and purport of the whole charge, there is no prejudicial error. *State v. Thompson,* 59 *N.J.* 396, 411, 283 *A.*2d 513 (1971). Such is the case here.

X

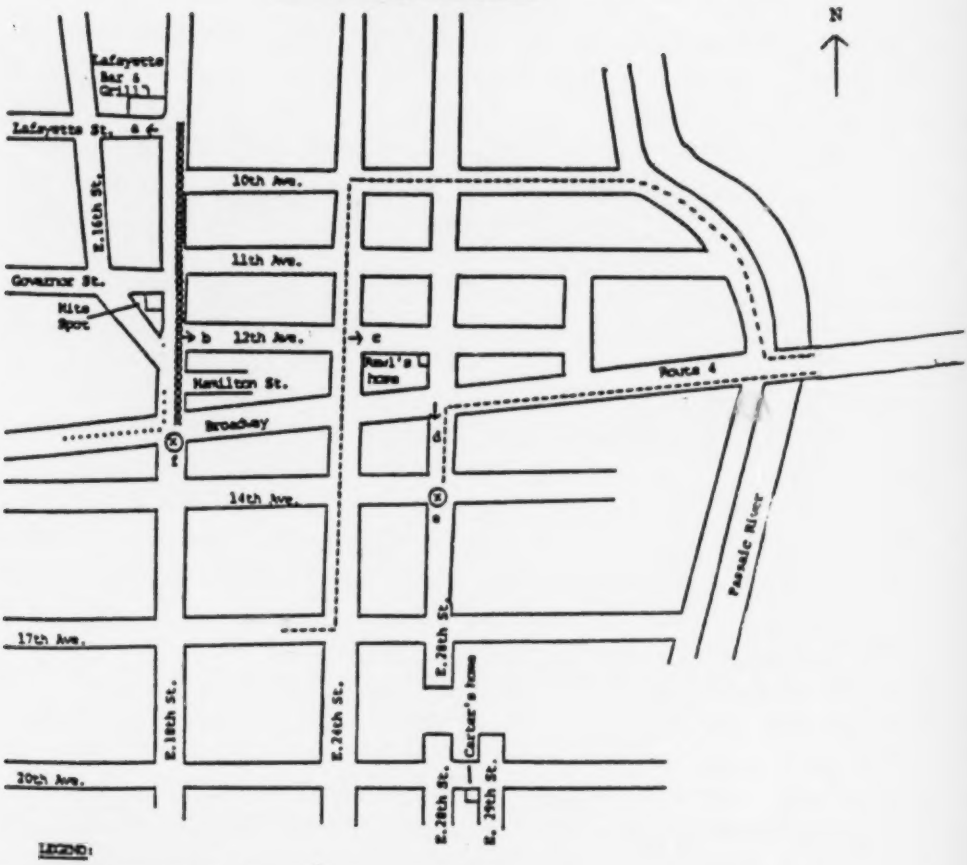
We have reviewed the numerous other alleged errors and find no merit in them.

The judgments of conviction are affirmed.

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APPENDIX I

Paterson (vicinity of crime)*



LEGEND:

- white car sighted
- white car containing Carter and Artis stopped
- route taken by police officers Nativo and Tanis when they see a white car at (b)
- route taken by police officers Capter and DeChellis when they see a white car at (c), attempt to find it on Route 4, see a white car cross Broadway at (d) and stop Carter and Artis at (e)
- route taken by Capter and DeChellis when they stop Carter and Artis at (f) and escort them to the bar

a. Mrs. Valentine sees white car drive away from the bar.
b. Nativo and Tanis see white car turn onto 12th Ave. from E. 18th St.
c. Capter and DeChellis see white car speed by on 12th Ave. at E. 24th St.
d. Capter and DeChellis see white car crossing Broadway on E. 28th Street.
e. Capter and DeChellis pursue the white car and stop Carter and Artis on E. 28th St. at 14th Ave. The police let the car go and proceed to the bar.
f. Capter and DeChellis leave the bar, stop the Carter-Artis car at E. 18th St. and Broadway and escort them to the bar.

*This map is not drawn to scale. Streets not relevant to this case, e.g., 15th Ave. and 16th Ave., are omitted.

CLIFFORD, J., dissenting.

A more egregious *Brady*[1] violation than the one presented by this case is difficult to imagine. One need not go so far as to impugn the motives of the prosecution in order to reach that conclusion, for it can just as easily be attributed to an appalling lack of basic communicative skills on the part of the principal polygraphist and various members of the prosecution team. But whether the circumstances originate in unworthy motives, colossal bungling, or plain dullness of comprehension, the fact remains that the misunderstandings thus created have proven to be costly indeed: the State withheld from the defendants material evidence favorable to them in connection with the Harrelson polygraph and, unknown to defendants and their counsel, compounded the error by using the mistaken and erroneous polygraph report to get the prime witness against defendants to change his story again and go back to his original testimony given at the first trial. That all adds up to a deprivation of due process and requires a reversal of defendants' convictions.

I

As our earlier opinion indicates, by the time the 1976 trial approached, the prosecution was understandably anxious about the credibility of Alfred Bello, the key identification witness. *State v. Carter,* 85 *N.J.* 300, 307, 426 *A.*2d 501 (1981). Bello had offered so many variations of his original "on-the-street" theme that that theme had receded into the background and the "in-the-bar" variations had become predominant. 85 *N.J.* at 305–07, 426 *A.*2d 501. Therefore, the State arranged for Bello to be subjected on August 7, 1976 to a polygraph examination by Leonard H. Harrelson. The purpose of the examination

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[1]*Brady v. Maryland,* 373 *U.S.* 83, 83 *S.Ct.* 1194, 10 *L.Ed.*2d 215 (1963).

was to evaluate Bello's credibility, including, as the former prosecutor testified at the remand hearing, "whether he was telling the truth or lying when he said he was in the bar at the time of the shootings."

Harrelson concluded that Bello was telling the truth when he said he was in the bar both before and at the time of the shootings. The polygraphist told members of the prosecution team shortly after the test had been completed that that was his opinion, and he persisted in it in the face of prosecution efforts to convince him it was "impossible." Harrelson has never waivered in that conclusion and, as was apparent on the remand hearing, believes it to this day.

For reasons that can charitably be described as unfortunate, in his later written report of his test the polygraphist summarized his findings with the opinion that Bello's 1967 trial testimony (which contained the "on-the-street" version) was "true": unfortunate, because Harrelson had never read Bello's 1967 testimony and no representative of the prosecution had enlightened him as to that testimony and hence he was plainly—and grievously—mistaken as to the location from which Bello said, in 1967, that he had witnessed the events before and after the slayings; doubly unfortunate, because although the State continued to promote the notion that Harrelson's "in-the-bar" conclusion was only tentative,[2] Harrelson specifically and adamantly insisted that he never used those or any similar words or ever made the statement to "anyone at all on the face of the earth that [he] was unsure of Bello's test results * * *"; and, most unfortunate of all, because the prosecution never told the defense the critical finding of Harrelson's test—that Bello was in the bar.

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[2] The trial court on remand adopted the same position to the extent that it determined that "the State was justified in its impression that Harrelson's oral report was preliminary or tentative and subject for further review."

Although the trial court on our remand determined that the prosecution was under no obligation to disclose to the defense the contents of Harrleson's oral report, the Court wisely has rejected that conclusion, *ante* at 1298. I agree with the majority in that regard and further in its apparent acknowledgement, *ante* at 1294, that the undisclosed information was favorable to the defendants. *See State v. Carter,* 69 *N.J.* 420, 432-33, 354 *A.*2d 627 (1976). It is in the final step of the analysis, namely, whether this undisclosed favorable evidence was "material" to the defense for *Brady* purposes, that I part company with the Court.

II

Whether Harrelson's undisclosed certitude that Bello was in the bar before and at the time of the shootings is "material" in the *Brady* sense turns on whether that evidence "might have affected the outcome of the trial." *United States v. Agurs,* 427 *U.S.* 97, 104, 96 *S.Ct.* 2392, 2397, 49 *L.E.*2d 342, 350 (1976), quoted in *State v. Carter, supra,* 85 *N.J.* at 313, 426 *A.*2d 501. That determination in turn rests in this case on two related factors: first, what use the prosecution made of the *ostensible,* but unintended, conclusion in Harrelson's written report—that the polygraph indicated Bello was on the street during the shootings; and second, what use the defense would have made of the *intended,* but undisclosed, Harrelson oral opinion—that the polygraph confirmed that Bello was in the bar both before and during the shootings.

—A—

Our earlier opinion adverts to the prosecution's use of the Harrelson document:

> After receipt of Harrelson's report two representatives of the prosecution interviewed Bello on September 14 and 15, 1976; and while the record is far from clear on the use, if any, made of the polygraph report

during that confrontation, the fact is that at the conclusion thereof Bello retreated from his "in-the-bar" story and returned to his 1967 account.

* * * * * *

An additional area ripe for exploration at the evidentiary hearing on remand is precisely what use the prosecution made of Harrelson's report in confronting Bello on September 14 and 15, 1976, prior to the second trial. The State argues that at the September 1976 interviews, Bello gave Chief Assistant Prosecutor Kayne and Chief DeSimone a detailed account of the various pressures and inducements that resulted in his recantation [of his 1967 "on-the-street" version], explained the basis for his [in-the-bar] statements to Assemblyman Hawkins and the Essex County Grand Jury, and thereupon returned to his 1967 trial version of the shootings. During the course of the 1976 trial, both Prosecutor Humphreys and Assistant Prosecutor Marmo told the court that the lie detector tests were instrumental in getting Bello back to the "on-the-street" version. The hearing on remand should explore how the polygraphist's report was linked to that result. [85 *N.J.* at 309, 315, 426 *A.*2d 501]

In some respects the evidentiary hearing on remand was not particularly helpful in establishing precisely how the polygraph test had been used. Chief DeSimone had died before the hearing, Messrs. Humphreys and Kayne were vague, and Bello was useless. Mr. Kayne "assumed" that when he and DeSimone went to see Bello in September 1976, they had with them a copy of Harrelson's report and they "very well may have" discussed the test results with Bello, but Kayne had no "specific recollection of what [he and DeSimone] may have told Bello."

One exception to this otherwise universal failure of recollection is found in Assistant Prosecutor Marmo's testimony concerning what Bello had revealed to him:

> When Bello would get in his testimony to the point where he was—where I was asking—brought him up to coming into the Prosecutor's Office telling the Essex County story, what happened to come back to the '66 story, he said I took the polygraph examination—or lie test, as he called it, the lie test showed that my testimony at the first trial was true; I knew the Essex County story was not true—he called it a fictionalized version—and I knew the Prosecutor's Office knew it *because the lie detector test showed it* and so I couldn't stick with the Essex County story—as you call it, the in the bar story—anymore, so I told the story that I told at the first trial, which is what happened (emphasis added).

This, coupled with the acknowledgement by both prosecutor Humphreys and Assistant Prosecutor Marmo during the 1976 trial, as noted in our earlier opinion, that "the lie detector tests were instrumental in getting Bello back to the 'on-the-street' version," 85 *N.J.* at 315, 426 *A.*2d 501, makes it abundantly clear that sometime after he had been subjected to the polygraph technique, Bello was confronted with the unintended "on-the-street" result of Harrelson's report, and that this confrontation caused him to return to his 1967 "on-the-street" version. That this is so is confirmed by documentary proof that surfaced at the evidentiary hearing on remand: a draft of a November 22, 1976 letter (coinciding with the conclusion of Bello's trial testimony) from Prosecutor Humphreys to Attorney General Hyland.

> When we first interrogated Bello, he told us the Hawkins-Essex County Grand Jury story. (Bello *in* the bar—four men involved. Carter and Artis outside the bar with weapons.) He then disappeared. How-

> ever, we found him in a far away state, arranged for his return and had Professor Haroldson [sic] examine him. Professor Haroldson concluded that Bello's 1967 trial testimony was the truth. We interrogated Bello further. Bello finally "br ke" and has given us the whole story * * *.

The conclusion is thus inescapable that not only did the prosecution know that Harrelson's written report contradicted his findings regarding the vantage point from which Bello had supposedly made his pivotal observations, but they concealed the fact that the "wrong" test result was fed to Bello to "break" him.

This determination is in no way undermined by the trial court's finding, apparently adopted by the majority, *ante* at 1298, that "Bello recanted the recantation when he told Harrelson during the polygraph pretest interview that Raab, Hogan and Levinson pressured him into recanting the 1967 trial testimony * * *." What bearing that can have on the present inquiry is unclear at best, given the fact that after Bello recited those pressures, he thereupon turned around and told Harrelson, directly contrary to his 1967 testimony, that he was *in* the bar when the significant events occurred. And Harrelson said the polygraph confirmed that version. And he still says that.

—B—

There can be little doubt that the defendants could have used Harrelson's undisclosed opinion had they but known of it.

First, the defense could have attacked Bello's credibility in a more devastating fashion than any other evidence in the case allowed for. The polygraph report itself would have been admissible by what the Court correctly perceives, *ante* at 1296, as the functional equivalent of a stipulation, see *State v. McDavitt*, 62 *N.J.* 36, 297 *A.*2d 849

(1972). Whether its admissibility would be limited to the *use* made of the report as distinguished from the *substance*—the scientific verification of the "truth"—is open to question. But for purposes of this case I submit it makes no difference to the result.

Were the evidence of Harrelson's report limited to the use the prosecution had made of it, defendants would have been in a position to argue that the State had persuaded Bello to return to the "on-the-street" version because that is what the "lie detector" results demanded. Marmo's recitation of Bello's reaction to the ostensible test results would tend to buttress that contention: Bello "told the story [he] told at the first trial" because the lie detector test showed the Essex County story was not true. *See supra* at 1286. The argument to the jury would have been that Bello was such a malleable witness that he would have testified to either the "on-the-street" or the "in-the-bar" version depending upon what he was told the polygraph test showed.

Second, the defense would have been able to attack DeSimone (on the not unreasonable assumption that it was DeSimone who, with Kayne, confronted Bello with the report and thereby "turned him around") for concealing the polygraphist's conclusion that Bello was in fact in the bar.

Third, if the report were deemed to be admissible for its substance, defense counsel could have confronted Bello with Harrelson's "true" opinion—a dicey maneuver, to be sure, inasmuch as Harrelson was equally firm in his conclusion that Bello had in fact identified Carter as having been at the scene. But the ultimate answer to this has to be that that strategem was well worth the risk, for the culmination of all this wholly unnecessary confusion (so the argument would go) is that no one can believe *anything* that Bello says: he can confound two polygraphists, Harrelson and Arther, on the very same issue—whether he was in the bar or on the street—by getting results 180°

removed from each other in tests given just weeks apart. Bear in mind that although, as the Court observes, *ante* at 1296, the "Harrelson test results, if laid before the jury, would have established that an eminent polygrapher entertained 'no doubt at all' that Bello was truthful when he identified the defendants" as having been at the scene, this same "eminent polygrapher" likewise entertained "no doubt at all" that Bello was equally truthful when he said he was in the bar before and at the time of the shootings. And an equally eminent polygraphist, Arther, was doubtless equally certain when he concluded that Bello was on the street. So much for the polygraph evidence.

—C—

Finally, to view the "added inconsistency that Bello told Harrelson that he was in the bar" as "merely cumulative," as the Court asserts, *ante* at 1297, is to gloss over the essential nature of that inconsistency and misgauge its potential impact.

The inconsistency these proceedings have focused on goes to more than a witness's inconsistency in describing the physical characteristics of a defendant or the color socks he was wearing. It goes to the opportunity and ability Bello had to identify defendants and to describe their movements. Chances are that what one sees from a vantage point within a tavern as all hell breaks loose is not going to be the same as what one sees as one strolls up the sidewalk after the carnage. The defense attacks on Bello's "on-the-street" story would have proceeded from a wholly different perspective and in an entirely different framework.

Might all of this have affected the out-come of the trial? How can we say it might not have, given the real capacity for the additional information to bring about the utter destruction of by far the most important witness in the State's arsenal, with the fallout levelling the vaunted po-

lygraphists and casting doubt on the tactics of the prosecution? Never before could defendants argue so persuasively that Bello was in all respects a complete, unvarnished liar, utterly incapable of speaking the truth. When, as here, a key witness's reliability might well have been determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the general rule that suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution. See *Napue v. Illinois*, 360 *U.S.* 264, 79 *S.Ct.* 1173, 3 *L.Ed.*2d 1217 (1959); *Brady v. Maryland, supra*, 373 *U.S.* at 87, 83 *S.Ct.* at 1186, 10 *L.Ed.*2d at 218; *Giglio v. United States*, 405 *U.S.*150, 153-54, 92 *S.Ct.* 763, 765-66, 31 *L.Ed.*2d 104, 108 (1972).

I would reverse and remand for a new trial.

Chief Justice WILENTZ and Justice SULLIVAN authorize me to record their concurrence in this opinion.

For affirmance—Justices PASHMAN, SCHREIBER, HANDLER and POLLOCK—4.

For reversal—Chief Justice WILENTZ and Justices SULLIVAN and CLIFFORD—3.

APPENDIX D

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY INDT. ~~167~~-66

OPINION ON REMAND

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

RUBIN CARTER,
Defendant-Appellant.

STATE OF NEW JERSEY
Plaintiff-Respondent,

v.

JOHN ARTIS,
Defendant-Appellant.

Decided—

Mr. Myron Beldock, of the New York Bar, and Professor Leon Friedman argued the cause for the defendant Rubin Carter (Messrs. Beldock, Levine & Hoffman; Mr. Ronald J. Busch, Messrs Busch & Busch; Mr. Harold Cassidy, Messrs. Perkins & Cassidy, of counsel; Thomas I. Atkins and Charles E. Carter on behalf of the N.A.A.C.P., of record)

Mr. Lewis M. Steel, of the New York Bar, and Professor Leon Friedman argued the cause for the defendant John Artis (Messrs. Eisner, Levy, Steel & Bellman; Mr. Louis S. Raveson, Mr. Harold Cassidy,

Messrs. Perkins & Cassidy, of counsel; Thomas I. Atkins and Charles E. Carter on behalf of the N.A.A.C.P., of record)

John P. Goceljak and Ronald G. Marmo Assistant Prosecutors, argued the cause for the respondent (Joseph A. Falcone, Passaic County Prosecutor, attorney).

LEOPIZZI, J.S.C.

The New Jersey Supreme Court has remanded this case to the Trial Court for an evidentiary hearing to establish through testimony and other evidence whether or not a new trial is warranted on either of two grounds.

The first inquiry to be considered is *whether the prosecution withheld material evidence favorable to the defense,* relating to the circumstances surrounding a polygraph examination of Alfred Bello by Leonard Harrelson.

The second ground to be assessed is *whether information developed since trial regarding the circumstances of that polygraph test would constitute such newly discovered evidence as to warrant a new trial.*

The evidentiary hearing commenced on May 18, 1981 and concluded on June 8, 1981—during which time the parties were given wide latitude to present and develop all relevant testimony and evidence.[1]

While it is unnecessary to discuss the protracted history of this case, the various Bello versions that surfaced since the 1967 trial should be detailed. I will refer to these versions in the analysis of the questions to be resolved.

In his 1967 trial testimony, Bello provided evidence directly incriminating the defendants. Bello said it was

[1] In addition to the testimony, exhibits and argument of counsel presented at the evidentiary hearing I will make reference to the trial transcripts and pleadings which are part of the voluminous record.

Carter who carried the shotgun and Artis who held the pistol, that he recognized both at once when he was confronted by them outside the tavern.

Between 1974 and 1976 Bello gave several accounts which varied from his original testimony at the 1967 trial. In 1974 Bello recanted the 1967 trial testimony. In a statement given to an investigator for the Office of the Public Defender, he repudiated his identification of the defendants made at the 1967 trial. He testified that although he was "present outside the bar when the shooting took place" and saw two black men "flee the scene", he did not see their faces and "could not identify them".

Thereafter, in October of 1975, he met with Assemblyman Aldridge Hawkins who was conducting an investigation into the case at the request of Governor Byrne. Two versions surfaced wherein Bello stated he was in the bar when two black men—not Carter and Artis—entered through the side door and began shooting; Bello was able to get out of the bar by being shielded by a woman who was shot; and as he ran around the corner, he saw Carter and Artis on the sidewalk. In his first statement to Hawkins, Bello insisted that Carter and Artis were unarmed when he was them on the street. In a second statement to Hawkins, and in his testimony before the Essex County Grand Jury, he modified this account to explain that although the defendants were not the triggermen, they were in fact armed. In June 1976 Bello was interviewed by members of the Passaic County Prosecutor's Office and related the same story he had given to the Essex County Grand Jury.

In the 1976 trial, Bello in effect recanted his recantation when he testified consistently with the original version he had given at the 1967 trial.

THE FALSE PREMISE

The defendants predicate their legal arguments with what is an unacceptable analysis of the evidence in this case.

Their principal theme is that the State suppressed discovery and/or *Brady* material when it failed to disclose to the defense, Harrelson's oral report, wherein, subsequent to his examination of Bello, he told the prosecution that he believed that Bello was telling the truth when he said he was "in the bar" before and after the shootings.

In it's opinion, the Supreme Court specified that the common ingredient of the "in the bar" narrative, as distinguished from the so-called "on the street" version, presented an account in which Carter and Artis were *not* the triggermen.

The defense has argued that if an evidentiary hearing were conducted, Harrelson would testify that he had obtained from Bello the Essex County, "in the bar" version—Carter and Artis not doing the actual killing.

At the hearing, Harrelson did not testify to ever having made any such representation to the defense or anyone.[2] During that testimony it developed that Harrelson, based on his discussions and examination of Bello, concluded that Carter and Artis were the triggermen, i.e., the two-man version.

Consequently, the defendants' premise is false. The account which Harrelson obtained from Bello is not consistent with the "in the bar" version which gave in Essex County where, the common ingredient, two people, not Carter and Artis did the killing (the four-man theory), but

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[2] After interviewing Harrelson—the defense proclaimed in a news release dated May 25, 1978 (S1032) that the new facts completely contradict the story Bello told at the 1976 trial and the claim that Carter and Artis were the killers.

rather is consistent with the original 1967 version, i.e., the two-man version identifying Carter and Artis as the triggermen.

The following is an excerpt of Mr. Harrelson's testimony on this point: 5/19/81, T148—18 to 25, T149—1 to 19:[3]

> Q. Now, from your examination of Mr. Bello and from your determinations as to what was the truthful version of this incident that was being given to you, was there any—ever any indication in the course of your involvement with Mr. Bello that there were any other perpetrators involved other than Carter and Artis.
>
> A. No, sir.
>
> Q. So that what you were concluding based on your analysis of what Mr. Bello was telling you and based on your judgment of what the truth was with regard to Mr. Bello's statement, you concluded that the murders were committed by Carter and Artis alone, is that correct?
>
> A. That is correct, sir. If I could just explain one more thing as to how I arrived at that conclusion?
>
> Q. Certainly.
>
> A. In a private conversation with Mr. Humphreys, he told me that he wanted the truth. He explained that there was so much pressure on this case coming at him from all directions, that he was under pressure to to prosecute Carter and Artis. He said to me I have to know the truth. When Mr. Bello told me that standing in the hedge at this Lafayette Grill that he observed Carter and Artis backing out of the front door,

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[3] Please note that (T) signifies the remand hearing transcripts and (Tr) signifies the 1976 trial transcripts.

> Carter with a shotgun and Artis with something in his hand, and my test indicated that that was the truth. There were no other people at all. These two people backing out of the door, that is how I arrived at that conclusion.

Defendants' contention that the apparent contradiction in Harrelson's written report assumes "critical significance" must be assessed in light of the revelation resulting from the remand hearing that defendants' premise regarding the said report is a false one. Although such an assessment readily compels the conclusion that *no* new trial is warranted, in keeping with the specific dictates of the Supreme Court's directives, the following explores fully both the *Brady* analysis and the newly discovered evidence analysis.

FINDINGS OF FACT

From the testimony adduced at the hearing, the exhibits marked in evidence, the pleadings and the trial transcripts, I make the following findings of fact:

Prior to the 1976 trial, the prosecution was aware that Bello had given various versions of the events of the 1966 Lafayette Bar killings.

Mr. Humphreys, the former Passaic County Prosecutor (now a Superior Court Judge) wanted to be satisfied that Bello was telling the truth when he identified the defendants at the 1967 trial. Accordingly, he decided to evaluate Bello's credibility by subjecting him to two polygraph examinations which were conducted on August 7 and September 30, 1976 by two leading experts, Mr. Leonard Harrelson and Mr. Richard O. Arthur, respectively. Both Humphreys and Harrelson were crucial witnesses at the remand hearing. They were credible witnesses. Their testimony was straightforward and candid. Humphreys documented each and every decision he made with regard to the *Carter* case, even though he had no idea that he

would later be called upon to account for his actions in Court.

As a matter of fact, Humphreys wrote to the New Jersey Attorney General on July 29, 1976 (Ex. DA-1109) concerning his decision to test Bello and other witnesses, wherein he stated that he did not believe a Prosecutor should place a witness on the stand if he had any doubts as to his credibility. In the same letter he indicated that he intended to have Harrelson's conclusions reviewed by another expert authority holding equal credentials. He reiterated this position again in a second letter to the Attorney General on September 15, 1976. (Ex.DA-1117). This negates any suggestion that Humphreys decided to have Bello tested by Arther because he was dissatisfied with Harrelson's results.

Furthermore, in arranging for the Harrelson examination, Humprheys wrote to Harrelson on July 26, 1976 (Ex.S-1000) emphasizing that the State's interest was only in "ascertaining the truth and prosecuting the guilty, not the innocent", and assuring Harrelson that "the prosecution had absolutely no interest or bias in the outcome of these tests, or this case, other than to see that the truth is revealed, justice is done and the chips fall where they may".

In a conversation with Harrelson, Humphreys told him that he wanted to know the truth, he explained that there was so much pressure on this case not to reprosecute Carter and Artis, that it was imperative that Humphreys know the truth. When Harrelson first met Humphreys he was impressed with him, because he recalled Humphreys having said to him that the only thing that he wanted to ascertain was the truth.

I find as a fact that the Prosecutor acted in good faith when he decided to have Bello tested. His main concern was to ascertain whether Bello told the truth when he identified the defendants at the 1967 trial. I am satisfied

that Humphreys intended to use the test as an investigatory tool by the prosecution for the sole purpose of ascertaining the credibility of the State's chief witness at the oncoming trial.

Prior to the test, Humphreys met with Harrelson on July 27, 1976. They discussed the case generally, including Bello's 1967 trial testimony and Bello's various versions. Harrelson had an opportunity to discuss DeMasi's polygraph charts of the lie detector test which DeMasi had conducted on Bello wherein he was critical of DeMasi's conclusion that Bello was "in the bar" at the time of the shootings.

Harrelson's assignment had been delineated in Humphreys' letter of July 26, 1976 (Ex. S-1000) wherein he had been told that Humphreys wanted to know if Bello was truthful when he had identified Carter and Artis as the gunmen. Consequently, Harrelson's main objective in testing Bello was to render an opinion as to whether or not Bello was telling the truth when he identified Carter abnd Artis as the killers.

It is clear that Harrelson was not concerned as to whether Bello was "in the bar" or "on the street". He did not equate either version with the defendants being the triggermen. His function was to give an opinion concerning the truthfulness of the identification of Carter and Artis by Bello at the 1967 trial. Humphreys had impressed upon Harrelson that the issue was that of identification.

Consequently, Harrelson understood Humphreys' concern and as a result, he felt it unnecessary to read the 1967 trial transcripts. Harrelson, in a letter dated June 30, 1977 (Ex. DA-1108) to Beldock and Steel, stated that he did not read the 1967 trial transcripts. At the remand hearing, when asked if he was familiar with 1967 Bello trial testimony, Harrelson said he had not read it and that his only concern was whether or not Bello had been truthful when he identified Carter and Artis as the triggermen.

Martin Kayne, the Chief Assistant Prosecutor, was assigned to the *Carter-Artis* case in July 1976 replacing DeVesa. When Kayne was originally assigned to the case he said he would accept the assignment on two conditions:

(1) If his investigation indicated innocence rather than guilt, the indictment would be dismissed;
(2) He would have the choice of man power for the unit assigned to the investigation. Humphreys agreed to Kayne's conditions.

Kayne's testimony at the remand hearing supports the State's position that Harrelson's written polygraph report was accepted as accurate and complete by the prosecution. Kayne met Harrelson for the first time when Bello was tested. While he did not discuss the details of the case with him he did offer to provide Harrelson with Bello's various statements and transcripts. Harrelson said it was not necessary to review those materials, since he knew all he need to know, by virtue of his July 27, 1976 meeting with Humphreys and pre-test interviews with Bello. Prior to Bello being tested, Kayne was aware of Bello's 1967 trial testimony, the recantation, and the various versions that had surfaced.

Kayne does not know why Bello agreed to being tested by Harrelson after originally refusing to cooperate and necessitating a material witness complaint to be filed on July 29, 1976. However, when he spoke with Bello, face to face, he agreed to come back to New Jersey and take the polygraph test.

Harrelson, in his letter of June 6, 1978 (Ex. DA-1114) noted that he had obtained the background information from his pre-test interview with Bello. Although he had not read Bello's 1967 trial testimony he was aware that Bello had identified Carter and Artis as having been at the scene when the shootings took place and knew that Bello had recanted that identification in 1974.

On August 7, 1976 Harrelson conducted the polygraph examination of Bello. Procedurally, he conducted a lengthy pre-test interview which was followed by a series of key test questions.[4] During the interview he took notes which were later incorporated into his written report. In the interview, Bello gave his reasons why he had recanted the original trial testimony.

Contrary to the contention of the defense, Bello recanted his recantation during this interview. He confirmed the State's suspicions that he had been manipulated by Hogan, Raab and Levinson to recant his 1967 trial testimony. This was consistent with Harrelson's conclusion that the recantation was not true.

During the testing procedures, following the fifth series of test questions, Harrelson asked Bello about his blood pressure and he replied that he had had a stroke six or seven months ago. He stated that he was supposed to take medication but had not done so. He complained that he felt a numbness in his left hand and fingers and stated that the numbness was ascending up his left arm. Harrelson decided to stop the test immediately.

After Harrelson concluded the test he told DeSimone that Bello was telling the truth when he said he was "in the bar" at the time of the shooting. DeSimone expressed the opinion that Bello could not have been "in the bar" at the time of the shootings, because if he had been, he too would have been shot. Harrelson stated that Bello had never told him that he had spoken with DeSimone and

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[4] Mr. Harrelson testified that when he tested Bello he instructed him to answer the questions by a yes or no reply only. Where the subject would attempt to explain or expand his answer, Harrelson would mark the graph in his handwriting with a T indicating that the sujbect did elaborate on the yes or no response. Regrettably he did not have the graphs available at the hearing because the polygrams and charts were found missing from his file. Mr. Beldock did not comment on the accusation. (5/19/81,T86-4 to 13, T179-11 to 19).

that he had told DeSimone he was "in the bar" at the time of the shootings.

Harrelson was sure of his findings that Bello was truthful when he said he was "in the bar". He did not say it was a preliminary report, however, he conceded that DeSimone could have considred it to be a preliminary because it was a verbal opinion which would be followed by a written report.

Kayne did not discuss any details of the case with Harrelson before the test, there was not any conversation between them as to the procedures for the testing. Kayne did assure Harrelson complete privacy during the testing. The pre-test interview was conducted between Bello and Harrelson alone.

Harrelson stated that Bello was not an easy subject to test because he had a heart murmur making polygraph testing difficult and that he would consult his notes and then submit a final report. Harrelson's preliminary oral opinion was that Bello had told the truth in the 1967 trial when he identified Carter and Artis as the triggermen.

From Kayne's viewpoint, the key issue at the time of the test was whether or not Bello told the truth in 1967. The issue in his opinion was not the location of Bello at the time of the shooting.

According to Kayne, what Harrelson and DeSimone discussed was whether Bello was "in the bar" at the time of the shootings, not necessarily the truth or falsity with regard to the polygraph.

After Bello's test, Kayne never spoke with Harrelson again. When the written report was received, Kayne did not read the report itself, but just the conclusion.

On the day Bello was tested, Humphreys and Marmo were on vacation. Humphreys was in Utah. Kayne had a telephone conference with Humphreys and advised him that

Bello was being tested, that Harrelson was satisfied Bello was telling the truth when he said he was at the scene at the time of the murders and that Carter and Artis were there with guns in their hands. Kayne said that Harrelson had some question about Bello being "in the bar" prior to and at the time of the murders.

On August 10, 1976 on his return from Utah, Humphreys had a conference with his staff, DeVesa, Kayne and DeSimone. At this meeting, Humphreys was told that Harrelson had tested Bello and that he was satisifed Bello was telling the truth when Bello said that he was at the scene of the murder and that he saw Carter and Artis with gunds in their hands. They were satisfied that they had a truthful witness they could put on the stand without reservation. At the meeting it was also revealed to Humphreys that Harrelson had some question as to whether Bello was in our out of the bar before and at the time of the murders.

On August 11, 1976 Humphreys had a lengthy phone conversation with Harrelson. Harrelson told Humphreys that he found that Bello was telling the truth when he said he saw Carter and Artis there and that they had guns in their hands at the time of the murders. Humphreys asked Harrelson about his finding that Bello was "in the bar" and he indicated that he would have to consider that finding further, by re-examining his charts and that he would address that matter in his written report. Before the Harrelson test of Bello, Humphreys knew that DeVesa had interviewed Bello in June 1976, when Bello was still conveying the same version which he had given to the Essex County Grand Jury (the four-man "in the bar" version). Humphreys was concerned because Harrelson had told him when he examined DeMasi's polygraph charts that Bello's 1967 trial testimony was true and that he had not been "in the bar" at the time of the murder. The question Harrelson was now raising was contrary to what he had told Humphreys earlier. As a matter of fact, Humphreys

had reported this in his report to the Attorney General dated July 29, 1976 (Ex. DA-1109).

While Humphreys does not recall asking Harrelson whether he found that Bello was telling the truth when he said he was "in the bar" at the time of the shooting, he knew that that was one of the reasons he had called him, he further recalled discussing with Harrelson, Harrelson's colloquy with DeSimone with regard to whether or not Bello was "in the bar" or "not in the bar". Humphreys did not make any effort to persuade Harrelson that the version that Bello was not "in the bar" was more logical.

Harrelson told Humphreys that Bello was telling the truth about being there and about Carter and Artis being there and having guns in their hands. As to Bello's exact location, Harrelson told Humphreys he was going to review his charts and address it in his written report. Harrelson did not say he was unsure about his conclusion, nor did he say that he did not have any question about Bello telling the truth when he said he was "in the bar".

After the telephone conversation with Harrelson on August 11, 1976, Humphreys was not left with any impression that Harrelson had any firm belief that the "in the bar" version was true. He was sure that Harrelson did not give him an opinion to the effect that Bello was "in the bar", because "if he did he would have done things he did not do". Humphreys was emphatic that when he spoke with Harrelson he was glad to know that Bello was telling the truth with regard to Bello's identification of Carter and Artis. With reference to the "in the bar" version, Humphreys was sure that Harrelson was going to review his material and address it in his written report.

The next time Humphreys spoke with Harrelson was after the trial. Harrelson confirmed the fact that the only other time he discussed the case with Humphreys again was after Beldock had called him. Humphreys told Har-

relson that he shiould cooperate with Beldock. After August 7, 1976, no one from the Prosecutor's Office called Harrelson to ask him to reexamine his material and submit a report as to whether or not he believed the "in the bar" version or if the "on the street" version was true. No one associated with the Prosecutor's Office had attempted to mislead, decieve or pressure Harrelson into reaching a different conclusion. No one had called him between the date of the test and the date of his report to ask him to explain his findings. In fact, except for the August 11, 1976 telephone conversation with Humprheys he had no contact with the Prosecutor or his staff.

Leonard Harrelson unequivocally states in his verified letter of June 6, 1978 (Ex. DA-1114) that at no time did any member of the prosecution team attempt to mislead or influence him with respect to the conduct of the polygraph examination of Bello or the report of the results thereof.

Harrelson testified as to why he concluded that Bello's 1967 trial testimony was truthful. As previously indicated, he conducted a lengthy pre-test interview wherein Bello gave a narrative of his observations the night of the incident.

After the interview, Bello answered test questions from which Harrelson was able to determine if Bello was telling the truth as to each answer. Bello told Harrelson that he began to recall things little by little, that he had not recalled when originally questioned. Bello stated the reasons why he recanted:

(1) He did not get the reward;
(2) He had committed himself to an alcohol rehabilitation program;
(3) He had been sentenced to jail for one year;
(4) A black person in jail promised him money;
(5) Hogan promised him a percentage of Carter's book;

(6) He thought by recanting he would gain his freedom from jail;
(7) He thought his life was in danger.

Based on Harrelson's analysis of the polygraph charts and from what Bello was telling him, he concluded that Bello was telling the truth when he stated that the murders were committed by Carter and Artis alone. Bello told Harrelson that he was standing in the hedges at the Lafayette Grill, that he observed Carter and Artis backing out of the front door, Carter with a shotgun and Artis with something in his hand, and the test indicated that that was the truth, there were no other people at all, only two men backing out of the door. In his written conclusion Harrelson stated that: "After careful analysis of the subject's polygrams, it is the opinion of the examiner that his 1966 (sic 1967) testimony at the trial was true, and the statement recanting his original statement is not true". (Ex. DC-1212).

In a letter to Arther, dated August 25, 1976 (Ex.DC-1205) Harrelson said that he had no doubt at all that Carter and Artis were the perpetrators of the annihilation, in other words he stated he had no doubt they were the murderers. He based this conclusion on his discussions and test of Bello.

If Harrelson had been called to testify he would have testified that based on his conclusions from the information he received from Bello and it's accuracy and truthfulness, there was no doubt in his mind that Carter and Artis were the murderers. Harrelson would have further testified that based on his examination of Bello there was no indication that there were any other perpetrators involved other than Carter and Artis.

After the interview, Harrelson gave Bello two polygraph tests. He asked Bello a series of questions incorporated in five tests. As Bello answered the questions during the test he was able to determine if Bello was telling the truth.

At the remand hearing Harrelson testified that Bello may have been in the washroom and not at the bar at the time of the shootings. Harrelson said that in his opinion no one else was involved except Carter and Artis. He said he concluded that Bello was telling the truth when Bello said that he saw Carter and Artis coming out of the bar with guns.

The following is a brief excerpt of Mr. Harrelson's testimony on this point. 5/19/81, T147—5 to 25, T148—1 to 24.

> Q. And when you say you have no doubt at all that Carter and Artis are the perpetrators of the annihilations, are you saying that you have no doubt at all that Carter and Artis are the murderers?
>
> A. That is correct, sir.
>
> Q. And hypothetically if you had been called as a witness at the trial and if you had been permitted to testify, would you have testified that it was your conclusion that Mr. Bello was telling the truth when he identified Carter and Artis as the murderers?
>
> Mr. Steel: I take it I have a standing objection:
>
> The Court: Yes, you do.
>
> A. That is correct, sir.
>
> Q. Now, when I say—just so that the record is clear, Professor Harrelson—when I say the murderers and you respond the way you do are you indicating that it was your conclusion that the murderers were —based on your analysis of what Mr. Bello was telling you, is it your conclusion that the murders were committed at the hands of Carter and Artis?
>
> A. It is, sir.

Q. Or should say by the hands of Carter and Artis?

A. It is, sir.

Q. In other words, you recognize Professor Harrelson, I'm sure you do, but just so that there's no mistake on the record, that the law recognizes that everyone involved in the crime is responsible for the crime.

A. Yes, sir.

But that people may be involved in committing a murder who don't actually pull the trigger or plunge the knife into the victim?

a. Yes.

Q. And still be responsible for murder, because they were involved or were aiding and abetting in some way, it that correct?

A. yes, sir.

Q. Now, from your examination of Mr. Bello and from your determination as to what was the truthful version of this incident that was being given to you, was there any—ever any indication in the course of your involvement with Mr. Bello that there were any other perpetrators involved other than Carter and Artis.

A. No, sir.

I find as a fact from Harrelson's testimony at the evidentiary hearing, that the account which Mr. Harrelson obtained from Bello does not conform to what the defense repeatedly has attributed to it throughout the history of this issue. The "in the bar" version which Bello gave in Essex County is very different from the account he gave to Harrelson. The common ingredient—two people *not*

Carter and Artis did the killing—is not present and never was present in the account Bello gave to Harrelson.

Richard O. Arther, a qualified polygraphist tested Bello on September 30, 1976. Prior to the examination he made a comprehensive study of the trial transcripts, reports and pleadings, he also examined other polygraphs of Bello and visited the scene of the crime. He was aware of the various versions Bello had given.

On testing Bello he formulated a series of test questions. Bello was asked the following pertinent test questions: (Ex. S-1004).

(1) Just after the shootings, did you see Hurrican Carter outside the Lafayette Bar?
Answer: Yes.

(2) Do you really believe Hurrican Carter was inside the Lafayette Bar when the shootings took place?

Answer: Yes.

(3) Did you murder anyone inside the Lafayette Bar?

Answer: No.

(4) After the shootings, were you the first person to go inside the Lafayette Bar?

Answer: Yes.

Based on Bello's responses Arther concluded as follows:

(a) Bello was truthful when he said Carter was in the bar when the shootings took place;

(b) That Bello was on the street just after the shootings and saw Carter there;

(c) That Bello was outside the bar when the shootings took place and he was the first person to go inside the bar after the shootings.

Arther wrote Harrelson advising him that "again we are in agreement". (Ex. DC-1206). Arther was aware of

Harrelson's written report prior to his testing of Bello, not only was he in agreement with Harrelson but there was no conflict between Harrelson's results and Arther's conclusion. Arther also concluded that based on his examination of Bello, in his opinion Bello was telling the truth in his identification of Carter and Artis as the perpetrators of the murder.

On the basis of Harrelson's and Arther's written reports, Humphreys was satisfied that Bello's 1967 trial testimony and not the recantation testimony was true. Humphreys documented this in a letter to the Attorney General on September 15, 1976. (Ex. DA-1117). In that letter, Humphreys indicated that based upon the polygraph tests and the prosecution's investigation he had concluded that the State should present at the forthcoming trial the same evidence and theory that was presented at the 1967 trial.

As to Bello having been questioned in preparation for the 1976 trial, he vaguely recalled testifying before the Essex County Grand Jury, admits that he said in 1975-1976 that he had been "in the bar" at the time of the shootings. Bello also recalled giving the "in the bar" and "out of the bar" versions. Bello's memory for details was poor, he did recall taking a lie detector test but he did not recall telling the "in the bar" version when he was tested. Bello had no recollection of any conversations with Kayne and DeSimone after the tests were administered nor does he recall having any discussions as to the results of the polygraph tests.

Bello did not recall having been tested by DeMasi in connection with the Essex County Grand Jury testimony. He did not recall being tested by another expert although he knows he was given more than one test, he could not recall the dates nor who administered the tests. With reference to his being interviewed by Kayne and DeSimone,

Bello did not recall what they had told him when they interviewed him on September 14-15, 1976.

Bello was aware that he could be prosecuted for perjury when Kayne and DeSimone interviewed him in September of 1976. No one had to tell Bello that he could be prosecuted for perjury, he already knew it.

As to Bello's testimony at the remand hearing, he had difficulty in remembering dates, conversations and specific details. He recalled testifying before the Essex County Grand Jury, that he gave Hawkins affidavits and that he testified at the 1967 trial. He further recalled that he had testified at the 1967 trial that he was "on the street". He also recalled being contacted by Raab, Hogan and Levinson. He did not recall anyone telling him that he passed or flunked the polygraph test, he did recall that he was "on the street" before the shootings.

Bello's memory at the remand hearing was very poor. He did not give the Court the impression that he had a convenient lapse of memory, but rather that he had reached a saturation point with this case and had blocked it out of his mind. He candidly stated that he had given many statements in many Court appearances over a period of years and that he just could not remember details.

The Court directed Bello to review the various transcripts so that he might refresh his recollection. The Court was concerned that Bello's lapse of memory would preclude the attorneys from asking Bello questions he would have been asked at the 1976 trial if the prosecution had disclosed Harrelson's oral statements. Bello was recalled after reviewing certain exhibits including Harrelson's polygraph report.

At that point Bello recalled being given the lie detector test by Harrelson and that he gave yes and no answers to the questions he was asked. He answered the questions to the best of his ability and knowledge at the time and

whatever he said was true. Bello did not recall any discussions with members of the Prosecutor's staff concerning the lie detector test, however, he did recall that what he told Kayne and DeSimone in the September 14-15, 1976 interview was true to the best of his knowledge. He was unsure as to whether or not he was shown the Harrelson report before his testimony at the 1976 trial. Bello did not recall discussing the results of the lie detector test with any member of the prosecution team nor did he recall being told whether or not he passed or flunked the test.

Bello further recalled that he had testified as to the "on the street" version at the 1976 trial and that the "on the street" version was true and that no one had pressured him into giving the "on the street" version.

Bello had been interviewed by Harrelson on August 7, 1976 before being tested. It was during this interview that Bello disclosed the fact that the recantation of his 1967 trial testimony was not true. Consequently, when he was interviewed by Kayne and DeSimone in September 1976 he had already indicated his reasons to Harrelson as to why he had recanted.

When referring to the testimony he had given at the 1976 trial, Bello indicated that the polygraph was what brought him back to the 1967 trial version. I conclude then that it was not the State's *misuse* of the polygraph test that caused Bello to revert back to the 1967 trial testimony. The test no doubt was used by the State for the very purpose for which it was intended, that is, as an investigatory tool in ascertaining the truth. I find that the State did not use the test to coerce or deceive Bello for the purpose of having him switch back to the "on the street" version.

After the defendants were granted a new trial, Assistant Prosecutor DeVesa interviewed Bello in June, 1976 at which time Bello related the same version he had given to the Essex County Grand Jury. This interview prompted

Humphreys to have Bello tested by the polygraphist. The State then decided not to speak with Bello until after the lie detector tests were conducted.

Humphreys and Kayne spoke with Bello after the Harrelson test when Humprheys returned from his vacation in Utah. They did not interview him, they merely asked Bello two or three short questions over a period of a few minutes. They asked Bello if he was there, if he saw two people there and were they armed. Bello answered all of thise inquiries in the affirmative. The next time Humphreys saw Bello was when he interviewed him prior to calling him as a witness at the trial. At that meeting they did not discuss the lie detector test nor the "in the bar" version. At that point Bello returned to New Mexico, where the Prosecutor would send him a copy of the 1967 trial testimony and he would be interrogated later.

Kayne and DeSimone interviewed Bello on September 14-15, 1976. Although no notes were taken, reports were dicated. (Ex. DA-1101 and 1102). When they interviewed Bello they showed him transcripts of his 1967 trial testimony. Kayne does not recall if they discussed with him the results of the polygraph examination. There were no threats of prosecuting Bello for perjury because of his testimony before the Essex County Grand Jury, i.e., the four-man version, Carter and Artis, not the triggermen.

In his affidavit of June 15, 1976 (Ex. DA-1114), Kayne stated that he did not have any recollection of discussing the lie detector test with Bello or anyone else in the Prosecutor's Office. Kayne never told anyone that the results of the polygraph test had been used to turn Bello back to his 1967 trial testimony.

In August 1976, Kayne was not concerned with Bello's Essex County Grand Jury testimony and the various versions of the incident. His primary interest was whether he told the truth in his 1967 trial testimony, as this had direct bearing on whether Carter and Artis had been

wrongly tried and convicted and whether the indictment should be dismissed. This was the condition imposed by Kayne when he accepted the assignment to investigate the case.

Ronald Marmo, an Assistant Prosecutor for the County of Passaic and Chief of the Trial Section, was trial counsel with Humphreys in the 1976 trial. He had been assigned to the Carter-Artis case when it was remanded for a new trial. Marmo reviewed the 1967 trial transcrfipts, recantation, Bello's affidavit to Hawkins and Bello's testimony to the Essex County Grand Jury. His purpose for reviewing these records was to whether or not there was any question of guilt.

Marmo was aware that Harrelson had reviewed DeMasi's polygraph charts on Bello and that he did not agree with DeMasi's conclusion that Bello was telling the truth when he said that he was "in the bar". Marmo never considered there to be an "in the bar" version as opposed to an "on the street" version. He was not interested in presenting either the "in the bar" or the "on the street" version. He was concerned in presenting the true version. As of August 1, 1976 Bello was saying he was "in the bar" which was consistent with his testimony before the Essex County Grand Jury.

At the time Bello was tested, Marmo was away on vacation. On his return, he was told that Bello was tested and that he was telling the truth with reference to the identification of Carter and Artis and that he was not telling the truth with regard to his recantation. Marmo does not recall DeSimone telling him that he had had a disagreement with Harrelson because Harrelson thought Bello was telling the truth when he said he was "in the bar". Marmo first learned of this when, after the trial, defense counsel filed the motion for a new trial. Marmo did not recall having known of it before that time.

The first time Marmo spoke with Bello was prior to the 1976 trial when the jury was being selected. By this time Bello had gone back to the "on the street" version. Marmo had read Harrelson's conclusion and indicated that he had no problem accepting the language contained therein. Marmo had been present when Harrelson had criticized DeMasi's test of Bello. Marmo felt that Harrelson was indicating that the Essex County Grand Jury story was not the truthful version.

Marmo assumed that Harrelson was familiar with Bello's various versions. Prior to his leaving for vacation, he had said to Kane, to be sure to have Bello's testimony available for Harrelson for review. The Bello testimony was made available to Harrelson, however, Harrelson indicated that he did not have to read it.

Prior to the 1976 trial and up to the post trial motions, no one on the Prosecutor's staff indicated that they had had any reservations about the accuracy of Harrelson's written conclusion. The original report the State received from Harrelson included the history which he obtained from Bello, the questions, the answers and his conclusion. The original handwritten notes were not included nor was there any opinion as to whether Bello's answers to Harrelson's questions were truthful or not. Without an explanation the answers present an ambiguity, e.g., in the fifth test Harrelson recorded the following questions and answers: (ex. DC-1202).

A. Were you inside the bar when you heard the shots?

A. Yes.

Q. Did you see Carter and Artis inside the bar?

A. No.

Q. Did you see two men inside the bar with guns?

A. No.

Despite the apparent ambiguity the defense counsel did not seek to interview Harrelson before the trial.

Marmo made no representations to Bello prior to the 1976 trial concerning possible perjury charges relating to Bello's Essex County Grand Jury testimony. When the Harrelson report was received Marmo read the conclusion, he never understood the report to mean anything other than precisely what it said in the conclusion. He never understood the report to conclude that the Essex County version was true or that there were four perpetrators, Carter and Artis not the triggermen. Marmo's interpretation was also predicated on the fact that he was present when Harrelson had been critical of DeMasi's test results wherein Harrelson expressed an opinion that the 1967 trial testimony was true.

When Marmo received Harrelson's written report it included the interview of Bello wherein Bello stated he was "in the bar". It also made reference as to why Bello recanted. The prosecution had suspicions as to how it came about that Bello recanted, but the first time Bello verbalized why he recanted was when he was interviewed by Harrelson.

The polygraph pre-test interview by Harrelson was in fact instrumental in turning Bello around because even before the State received any test results, oral or written, Bello had stated that the recantation was false and that his 1967 trial testimony was the truth.

The test interview was what triggered Bello to return to his original 1967 trial version, the prosecution did not misrepresent the test results to turn Bello around nor did the State threaten Bello with prosecution for perjury in order to coerce him into recanting the recantation.

Roger Witherspoon, a reporter for the New York Daily News wrote an article on September 1, 1976 concerning the polygraph tests administered to the State witnesses.

The article indicated that because of the lie detector test results, the prosecution would try to prove only that Carter and Artis were involved in the triple slayings, not thay they committed the killings. The article continued: "The shift in the Prosecutor's position, it was learned, stems from the inability of key witnesses to pass lie tests on their testimony that Carter and Artis actually committed the killings." (Ex.DA-1106).

On September 8, 1976 Mr. Steel appeared before the Honorable Charles S. Joelson on a motion for a dismissal of the indictment and change of venue based on adverse pre-trial publicity. The Daily News article was brought to the Court's attention by Mr. Steel. Mr. Steel indicated to the Court that he considered it to be an extremely important article. He asked the Court to be permitted to make a statement as to what he perceived it's significance to be. He advised the Court that the article quoted unidentified sources with regard to a whole host of polygraph tests involving multiple witnesses. He requested that the Court grant an evidentiary hearing as to the source of material in the article.

Mr. Humphreys was aware of the article and advised the Court that he was greatly disturbed because he felt it contained material prejudicial to the defendants and to the State. He further stated that he had issued a statement stating that the article was pure speculation, contained numerous inadequacies and inaccuracies, and that it did not originate from his office.

Mr. Steel pursued his request for an evidentiary hearing wherein he stated: (Ex. S-1034, Pgs. 9, 10, 154, 155).

> If your Honor grants us an evidentiary hearing, I will call Mr. Witherspoon. And I must say one other thing about this article, your Honor. And I think this is significant. This article goes into great detail as to where certain things occured in terms of tests, under what circumstances, par-

tial pass, partial fail. Now, either one of two things occurred here. Either Mr. Witherspoon has an incredible imagination and is a most despicable reporter, or someone connected with the Prosecutor's Office, or the police—and as your Honor knows the cases make no distinction between the two—is handing out information which the Prosecutor and/or policy believe serve the purpose of the prosecution in this case.

THE COURT: Well, what is here that hasn't in one way or another already been published, anything?

MR. STEEL: Well, your Honor, yes. The specific information about the Bello test has never been published before, and I have never seen it before. And considering the fact that Bello is going to be a key witness, I am told, in this particular case, that is highly significant.

* * * *

THE COURT: I think I should state for the record that Mr. Witherspoon came into my office and told me that he will stand upon his right not to divulge his source.

MR. STEEL: I understand that. He told me the same thing. And I assume, if called as a witness, he would abide by that decision. And I also assume, although I'm not an expert in the field, that Mr. Witherspoon probably quite carefully couched the wording of his article so as to come within the protections of the statute, and so therefore would not be required to divulge his source.

* * * *

MR. STEEL: The point I'm trying to make is

> we have an article with new material in it. Your Honor asked me about that new material. It's new, and as far as I'm concerned it appears on the face of it, and it deals with testing procedures.

At the remand hearing, Steel acknowledged that Witherspoon had made statements in the article which Humphreys had called inaccurate, also that the article portrayed Carter and Artis to be aiders and abettors which was not consistent with Harrelson's written report. Despite this information Steel did not interview Harrelson to explore the inaccuracies that had appeared in Witherspoon's article.

When this Court referred Mr. Steel to the transcript hereinabove quoted, to ascertain why he did not find it imperative to make an inquiry of Harrelson as to the reported inaccuracies, he stated that all he knew concerning the information contained in the Witherspoon article was (1) that an article had been published, (2) that Humphreys denied the accuracy of the article. He indicated that anything further, such as Bello being given a lie detector test would be purely speculative. Steel would not admit that when the defense received the Harrelson written report on September 14, 1976, that portion of the Witherspoon article referring to an expert from Chicago must have been accurate.

I fail to grasp counsel's absurd analysis of these developments. Steel knew that Witherspoon would invoke his statutory right not to divulge his source of information concerning the September 1, 1976 article. The only logical person who would be in a position to give him accurate information would be the expert who gave the polygraph test. Yet, defense counsel did not consider it of any consequence to contact Harrelson before the trial in order to obtain further explanations of the inaccuracies appearing

in the news article and the apparent inconsistancies contained in the fifth series of test questions.

The defense contends that the Bello polygraph examination, though never introduced by the prosecution, was of controlling importance at the trial. Defendants make reference to a "ruling" by the Trial Court that if the defense asked Bello any questions about why he had switched to the "on the street" story, this would "open the door" as to the admissibility of the Harrelson polygraph examination and results.

At the remand hearing defense counsel pointed out that if the true test results had been known by the defense, the prosecution could not have blocked their cross-examination of Bello as to how he had returned from the "in the bar" to the "on the street" version. The defense further pointed out that they would have urged that the threat of perjury was used as the real reason to "turn" Bello around.

During the trial on November 18, 1976 defense counsel began to cross-examine Bello about any meetings he may have had with members of the Prosecutor's Office in the summer of 1976. At this point, the Prosecutor objected on the ground that it would be unfair to permit defense counsel to go into this area without allowing the State to bring out what it was that made Bello conclude that his 1967 testimony was true, specifically the lie detector test.

Marmo was concerned that at some point during Bello's trial testimony Bello might mention the lie detector test, which would participate a mistrial. The Prosecutor advised the Court that while they did not have an objection to defense counsel's cross-examination, they were apprehensive of what Bello might say. As a matter of fact, the State had no objection to the entire Harrelson report and history going into evidence. The colloquy that followed was in chambers, but on the record. The Court instructed counsel to pursue another area so that counsel would have

an opportunity at a latter time to argue their position against the admissibility of the lie detector test if the door was opened. There was not any "off the record" argument nor ruling as to the merits of the problem. During the trial all of the in chamber conferences were "on the record" except for conferences at the end of the Court day for housekeeping type discussions as to discovery matters and the scheduling of witnesses. The Court ruled that defense counsel would be permitted to continue their cross-examination, however, reserved as to whether the test would be admissible.

The following day, November 19, 1976, the Court advised Bello that the fact that he took a polygraph test and the results of it were not admissible. The Court further told Bello that it was aware that the Prosecutor had told Bello not to mention the test, but to make sure there was no misunderstanding Bello was told not to mention the lie detector test under any circumstances because they were not admissible. The Court further ruled that *State v. Parsons*, 83 *N.J. Super.*430, 436 (App. Div., 1964) and *State v. Clark*, 128 *N.J. Super.*120, 126-127 (App. Div., 1974) were dispositive of the issue. There the Court has made it crystal clear that the results of lie detector tests of witnesses are not admissible.

On November 22, 1976 the defense attorney resumed his cross-examination of Bello and referred Bello to having met with some members of the Prosecutor's staff and having changed his version as to what he had said at the 1967 trial. The Prosecutor interposed an objection for the same reason he had objected previously, i.e., Bello might mention the lie detector test. The Court advised the Prosecutor that this area had been covered on his redirect examination of Bello, the Prosecutor advised the Court that this line of questioning may open the door to some other matter that may not be admissible; the Court then admonished counsel to keep within the guidelines of it's rulings.

The Court denied the objection, stating that it did not see any "peril" with regard to the question as long as counsel stayed within the guidelines earlier set forth. Counsel then asked Bello further questions in this area relating to the place where the interrogation by Kayne and DeSimone took place and the length of time Bello spent with them. There was no ruling by the Court precluding defense counsel from questioning Bello in this area, provided that no question was elicited directly relating to his having taken the lie detector tests. For example, if counsel had decided to question Bello as to the history he had given Harrelson pertaining to the "in the bar" version, they could have done so, as long as they did not refer to the fact that this history was obtained when Harrelson was testing Bello. The Court was concerned that *any* reference to the polygraph test would be prejudicial to the defendants thereby precipitating a mistrial.

As indicated, the 1976 trial transcript reveals three references to the lie detector test, on November 18, 19 and 22. The first time that the issue of the Bello polygraph test was raised during the trial was on November 18. At that point the defense had Harrelson's report, the history he took from Bello, the questions and answers, and Harrelson's conclusions. The handwritten notes were obtained by the defense from Harrelson after the trial.

After receiving the Harrelson report on September 14, 1976 the defense never asked to interview Harrelson either before or during the trial. The history which Harrelson took from Bello indicates the reasons why he had recanted his 1967 trial testimony. Prior to Harrelson's interview, Bello had never told anyone the details of the recantation. Defendants urge that they were prejudiced by being given this information during the trial, (that the State used the test to turn Bello around). However, the defendants did not seek a continuance to interview Harrelson, nor request to *voir dire* Bello, DeSimone or Kayne and no Court Order

prevented them from subpoening Harrelson and calling him to testify.

Defense counsel did not pursue the matter for tactical reasons. They could have requested a *voir dire* examination of Bello or any other State witness to develop the facts pertaining to Bello's return to his original testimony. They could have interviewed Harrelson as to any ambiguity in his report. Had they pursued the matter, Harrelson would have reiterated as he did in a letter to the Prosecutor on June 6, 1978 (Ex. DA-1114) that in his opinion the 1967 testimony was true and the recantation was not.

In addition to impeachment material brought out on Bello's direct examination, the jury was given, through skilled and lengthy cross-examination, a penetrating view into Bello's history and background. Counsel were unrestricted in conducting a meaningful examination.

The defense had been provided with voluminous discovery material including transcripts of Bello's trial testimony, statements, affidavits and the Essex County Grand Jury testimony. As a matter of fact, it developed during the 1976 trial that the defense was privy to Bello's various versions long before the prosecution. The defense had knowledge of the numerous tapes Bello had prepared of his fictionalized version which were given to Joseph J. Miller and Melvin Ziem, which were to be the basis of a movie and book about the Carter case entitled the "Lafayette Bar Massacre". Bello was questioned about the discrepancies between his trial testimony and prior versions. He was also questioned as to any threats of perjury which may have induced him to cooperate with the State in returning to the "on the street" version.

The background pertaining to the reasons for Bello having come forth with the "in the bar" version given to Assemblyman Hawkins and before the Essex County Grand Jury was developed at length during the 1976 trial.

The cross-examination of Bello began with the *Stovall* hearing relating to Bello's identification of the defendants as the men he had seen outside the bar after the shootings. During the *Stovall* hearing Bello was examined on the fictionalized tapes he had made with Miller and Ziem, as well as other information provided by Bello to Assemblyman Hawkins and the Essex County Grand Jury.

Bello was asked with reference to his conversations with Chief DeSimone prior to the 1976 trial, the following: "When did you decide you were going to clear up the lie of Essex County, sir, and told the version you told here, when?". Bello responded: "I came here to tell exactly what happened and I told it right here".

Bello was examined extensively on alleged pressures and coercion used by the prosecution to obtain Bello's testimony in the 1976 trial, as well as efforts to obtain a reward which had been posted following the murders for information leading to the perpetrators. Further cross-examination aluded to the questions of possible promises made to Bello by the prosecution to induce his cooperation. During that questioning Bello was referred to his earlier testimony that the statments he had given to Hawkins and testimony before the Essex County Grand Jury was false. The following is an excerpt of the questions in this area: 11/20/76, TR10-4 to 25, Tr11-2.

Q. You understand that was under oath?

A. Yes.

Q. And you understand that that made you subject to being prosecuted for the crime of perjury?

A. Yes.

Q. Have you ever been prosecuted for that? Yes or no.

A. As of yet, no.

Q. And you testified that you lied under oath before the Essex County Grand Jury. Is that right?

A. Yes, sir.

Q. And when you did that, was that perjury?

A. Yes.

Q. Have you been prosecuted for that crime?

A. Not as yet.

Q. Do you have any promises at this point that you won't be?

A. No one promised me anything.

Q. Any discussions?

A. No discussions or anything.

Q. Any hopes?

A. If I perjured myself I'll do the time for it. I'm quite sure you're not going to do it.

The trial transcripts therefore disclose that the defense was permitted wide latitude in questioning Bello concerning variances in the prior versions as compared with his trial testimony. He was also questioned extensively as to whether he had been pressured or coerced to go back to th 1967 trial testimony.

In my charge to the jury I catagorically instructed them that "if after considering and weighing all the evidence you are not satisfied beyond a reasonable doubt that Rubin Carter and/or John Artis has been accurately and unmistakenly identified as the attackers you must find them not guilty".

The jury was fully aware of Bello's criminal background and other unlawful activities. He was portrayed before the jury as a perjurer, liar and thief. Certainly the cross-ex-

amination by these experienced lawyers had not portrayed Bello as a person of integrity and honesty. Despite this, Bello left the stand unshaken as to identification of the defendants.

The evidence before the jury was more than sufficient for it to conduct a discriminating appraisal of Bello's credibility. His credibility was severely and repeatedly assailed from every conceivable angle through the lengthy and extensive cross-examination over a period of several days.

The jury found Bello's 1976 testimony credible despite the fact that the jury had the entire background of Bello's recantation and the "fictionalized" version he had given in Essex County.

There is therefore no merit to defense counsel's argument that Bello's credibility would have been affected if they pursued the reason for his recant of the recantation. Bello's reasons for the turnaround had been fully explored before the jury through the lengthy and skillfully conducted cross-examination by defense counsel.

At the remand hearing, the defense offered the testimony of former Assistant Prosecutor Richard Thayer and former Investigator Richard Caruso in a futile effort to show that the State had withheld material evidence from the defense and that the suppressed evidence was instrumental in having Harrelson alter the conclusions contained in his final report of August 24, 1976. Their testimony was predicated on rank hearsay, inaccurate information, conjecture and unfounded rumors.

Thayer was never assigned to participate in the Carter-Artis investigation. He alleged that his sole source of information was "second hand" information through conversations with Caruso and DeVesa. He learned, sometime in 1976 (August thru October 1976) from these individuals that there was a problem with the first polygraph examination. Specifically, the polygraph examiner had stated

orally that Bello was "inside the bar". This information was passed on (but no one is sure as to when or by whom) that the conclusion in the written report was inconsistent with the initial oral report.

This information which was relayed to Thayer by others was not based on his own personal knowledge. Thayer admitted that he had never received any first hand information, had never seen the report and the information which he received could have been third, fourth or even fifth hand. Thayer's recollection was that he had received information, he did not know from whom, that Chief DeSimone had spoken over the telephone with the polygraph examiner over a course of a few weeks about the wording of the written report.

The following is an excerpt from Thayer's testimony indicating the basis of his information: 5/28/81, Tr174-10 to 22.

> Q. Did you learn or was anything conveyed to you with regard to the mechanism as to how the written report came to state something different than the oral report.
>
> A. I have a vague recollection. I don't know how I came upon this information, but the recollection, my best recollection is that DeSimone, then Chief DeSimone, had spoken with the polygraph examiner over the course of a few weeks about the wording of the conclusion of the written report and I believe that was done on the telephone, but at this point in time I can't pinpoint when I found that out or from whom I learned that information.

Thayer does not remember the exact source(s) of the information about the polygraph results nor when he received this information. He does recall that Caruso had mentioned to him that Bello had "flunked the test". This

occurred while Caruso was on the Carter-Artis task force. He possibly received this information from more than one source but could not state who had told him nor at what point in time. He did not obtain any information from Kayne or DeSimone, he did not believe that Caruso, Fitzsimmons or DeVesa had firsthand information. The information relating to Bello's "flunking" the lie detector test could have been obtained after the sentencing in February of 1977. "Flunked" had to do in Thayer's opinion, with Bello being inside or outside the bar.

As an Assistant Prosecutor in January-February 1977, Thayer had handled a highly publicized case against the Passaic County Sheriff, the Paterson Police Chief and other city detectives wherein Thayer was criticized and embarassed by the press for his handling of the case. All the indictments were ultimately disposed of and it was after these events that Thayer put in his resignation to the Prosecutor's Office.

After Thayer had submitted his resignation in the late spring of 1977, he met Mr. Seymour Wishman, a private attorney, in the Court House cafeteria and told him he suspected that there had been a violation of discovery rules with respect to the polygraph tests and that an initial report by a polygraph expert was inconsistent with the conclusion in the written report. About six months to one year later he spoke with Mr. Fogel, an attorney for the defense team. He relayed basically the same information to Fogel as was given to Wishman. Thayer knew Mr. Joseph Falcone the former First Assistant Prosecutor, (now the Passaic County Prosecutor) from their association in the Essex County Prosecutor's Office. He also know Assistant Prosecutor DeVesa, who was then in charge of the Carter-Artis investigation, from the Essex County Police Department and as a personal friend. He had high regard for their integrity and fairness.

During this 1976 period he was in regular contact with both Falcone and DeVesa. He knew that had he brought this information concerning the suspected violation of the discovery rules to them they would have proceeded on the information and would have attempted to remedy the situation. Despite this close relationship he chose to pass this information to Wishman, a prior acquaintance he happened to meet in the Court House cafeteria. At the hearing, he conceded that it would have been more prudent to alert Falcone and DeVesa instead.

Thayer contends that he does not bear any grudge against Passaic County due to occurrences at his last trial with the Prosecutor's Office. He stated that he did not think his bad experience at the trial had affected his decision to tell Wishman. He told Wishman the information in the context of why he was leaving of office.

This troubles me. Thayer knew that if he had given this information to DeVesa or Falcone they would have checked it out and would have found that it was sheer hearsay and without merit. This would have caused him further embarassment. Instead he chose to retaliate against the office by attempting to embarass the office by relaying the unfounded rumors to the defense.

The only "proof" submitted by the defense to show that the State influenced Harrelson's final conclusions is found in the quoted testimony of Thayer. There simply is no other evidence. As a matter of fact, the defense examined all of Harrelson's incoming and outgoing telephone calls from his office during that period between Harrelson and DeSimone to ascertain if there had been any conversations between them which would be conceived to have been an attempt to have Harrelson modify his reports.

This produced one call—in which DeSimone made an inquiry of Harrelson's office as to when the written report would be completed.

When Harrelson testified, the defense counsel were aware of Thayer's anticipated testimony concerning the allegation that DeSimone called Harrelson on the phone with reference to the wording of his conclusion in the written report. They examined Harrelson at length as to numerous details but never saw fit to make any inquiry about the alleged calls from DeSimone. The reason they did not ask Harrelson is obvious. Harrelson would have revealed that no such conversation took place.

Caruso, an investigator for the Prosecutor's Office was assigned to the Carter-Artis task force via DeVesa's recommendation. He was not present and did not observe Harrelson test Bello. According to Caruso, at or around the time of the test, Caruso was approached by someone (maybe Fitzsimmons) and was told that Bello failed the test. Later, he thinks, word was circulating around the office that the test results were inconclusive. He later heard that Bello had passed the test. Caruso was present, but did not participate in the June 21, 1976 interview with Bello by DeVesa. He recalled that Bello related the 1967 version but does not remember specifically, and would need to read documents to refresh his recollection. After being shown Exhibit S1103, a June 27, 1976 memo by DeVesa, Caruso did not specifically recall which set of facts Bello was conveying on June 21, 1976. We now know that Bello had given DeVesa the "in the bar" version.

Caruso understood that the purpose of Harrelson testing Bello was to verify which version, the 1967 trial testimony or the Essex County testimony, was the truth. According to Caruso's testimony, he somehow knew that there was something about there being some inducement to Bello to change his testimony. However, he did not know when this information came to him or from whom. Caruso never saw the summary which Bello gave to Harrelson prior to the testing on August 7, 1976 and does not recall if he was aware that Bello had discussed with Harrelson the reasons for his recantation.

Caruso brought his file to Court. There was nothing in the file concerning the polygraph test. The defense attorneys were very interested in examining the file, however the Court precluded them from doing so because according to Caruso the file did not contain any relevant data. It later developed that the defense team was well aware of the contents of his file because Caruso had spoken to Messrs. Cassidy, Fogel, Steel and Beldock (members of the defense team) at which time he had the file open and went through it and discussed with them what was in the file. Since it was determined that there was no relevant information in the file, the Court impounded the file.[5]

Caruso alleges that he received information from Fitzsimmons concerning the polygraph examination of Bello. He does not know where or when Fitzsimmons obtained the information. According to Caruso, he first learned from Fitzsimmons that Bello had "failed" the polygraph tst. He later got word that the test was inconclusive. But he does not recall when he heard this or from whom. Later he learned Bello "passed" the test but does not recall if he learned this before or after the trial.

Former Passaic County Investigator Fitzsimmons, now with the F.B.I., was definite in his testimony that he never conveyed any information to Caruso regarding the Bello polygraph. Fitzsimmons had no direct knowledge about the

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[5] On August 12, 1981 this Court received an affidavit from Mr. Beldock seeking to have the Court reconsider it's denial of the request by the defense counsel to inspect Caruso's file. (Ex. DC-1230). At the remand hearing Caruso stated that the file did not contain any relevant information pertaining to the polygraph issue. He also stated that the defense counsel had been privy to the contents of the file prior to the remand hearing, (contrary to Beldock's assertion in the affidavit that defense counsel never had access to or examined the Caruso files or the contents). The Supreme Court has retained jurisdiction in this case, therefore, any matter which is unrelated to the polygraph issue is to be addressed directly to the Supreme Court.

polygraph tests, and although he had at one time heard Caruso and Thayer making comments to each other about the polygraph test, he paid little attention to it because at the time, on a daily basis, rumors, bad information, and just general gossip were prevalent around the Court House concerning the case. Fitzsimmons ignored Caruso's comments because he knew that Caruso always had numerous theories and ideas about the case and the criminal justice system in general. He had many different dissatisfactions and constantly pereceived problems and questions because he had an "active" mind.

Thayer learned generally from DeVesa that Caruso had previously made allegations of impropriety concerning the Newark Police Department. Caruso has had problems wherever he has worked. He is currently having problems with his position as a police officer in Brick Township. Caruso himself admitted that DeVesa would not let him pursue assignments because as DeVesa put it, he, Caruso, had been told by DeVesa to look for "A", "B" and "C" and instead Caruso came back with "D".

DeVesa commented at the hearing that Caruso was always complaining about the *Carter* case "and every other case" and as a result DeVesa paid little heed to his observations, since there was no basis in fact for his theories. Thayer was aware that DeVesa considered many allegations of Caruso, groundless.

Thayer and Caruso obviously were motivated by personal reasons for their testimony. They were hurt. Caruso's reputation had caught up with him in that he had no basis in fact for his theories. Thayer's forced resignation after the Englehardt fiasco left him embarassed and humiliated. His professional reputation had been attacked by the new media. After a review of the evidence presented by these two witnesses, which is predicated on hearsay, rumor and speculation, this Court finds their testimony to be simply incredible and unreliable.

In conclusion, I find as a fact that:

(1) Prior to the 1976 trial, Bello had given various versions of the events of the 1966 Lafayette Bar killings;

(2) The Prosecutor was concerned in ascertaining which version was true;

(3) He decided, in good faith, to use the lie detector test, as an investigatory tool to ascertain the truth; he assigned two leading, nationally known polygraphists, Harrelson and Arther, to test Bello;

(4) Based on the discussions and examination of Bello, Harrelson concluded that Carter and Artis were the triggermen, i.e., two-man version;

(5) Arther concluded that:
   (a) Bello was truthful when he said Carter was in the bar when the shootings took place;

   (b) That Bello was on the street just after the shootings and saw Carter there;

   (c) That Bello was outside the bar when the shootings took place and he was the first person to go inside the bar after the shootings;

(6) After Harrelson had tested Bello he told Chief DeSimone that Bello was "in the bar" prior to and at the time of the shootings and that he would submit a written report at a later date (consequently the State considered the oral report to be a preliminary report);

(7) The written report stated that Bello's 1967 trial testimony was true and that the statement recanting his original statement was not true;

(8) Harrelson did not verify the State's contention that his oral report was only a preliminary report;

(9) Harrelson never conceded that this was only a preliminary report nor that he indicated that upon further review his initial conclusion might be altered;

(10) Harrelson never suggested to the prosecution team in any fashion that the conclusions in his written report were at variance with what he had told them in his oral report, namely, that Bello's "in the bar" version was true;

(11) The State failed to disclose Harrelson's verbal opinion to the defense, however there was justification for the nondisclosure for the following reasons:

(a) Harrelson told the State's representatives that following his verbal report he would file a written report. He testified that while he did not use the words tentative or preliminary when he stated his opinion after testing Bello, he did concede that Chief DeSimone could have considered his oral report as a preliminary report since he had given DeSimone a verbal report to be followed by a written report;

(b) Upon receiving Harrelson's written report, the State's representatives accepted it as being accurate and dispositive of the question which Harrelson had been assigned to resolve, that is, whether Bello was being truthful in his 1967 trial testimony when he identified Carter and Artis as the gunmen;

(c) The written report indicated that following the fifth series of fact questions given Bello,

the "examiner" decided to stop the examination immediately, indicating that the test was not completed;

(d) When the State received Harrelson's written report it was clear as to his findings and conclusions and the State accepted it as such;

(12) At no time did the prosecution attempt to mislead Harrelson or influence his findings;

(13) The prosecution did not cause Bello to recant his recantation through coercion, deceit, or threats of prosecution for perjury; nor did the State misrepresent to Bello the results of the polygraph test to get Bello to go back to the "on the street" version;

(14) Bello recanted the recantation when he told Harrelson during the polygraph pre-test interview that Raab, Hogan and Levinson pressured him into recanting the 1967 trial testimony;

(15) The defense was not diligent when, as a result of post-trial hindsight, it decided to interview Harrelson for the first time. The Witherspoon article published before the trial, the ambiguities which appeared in the Harrelson report and the developments during the trial should have alerted defense counsel to make inquiries at that time and not after the trial;

(16) The account which Harrelson obtained from Bello is not consistent with the "in the bar" version which Bello gave in Essex County where the common ingredient, two people, not Carter and Artis did the killings (four-man theory);

(17) That had Harrelson been called to testify at the 1976 trial he would have testified that:

(a) Based on his conclusions of the information he received from Bello and it's accuracy and truthfulness, there was no doubt in his mind. that Carter and Artis were the murderers;

(b) That based on his examination of Bello there was no indication that there were any other perpetrators involved other than Carter and Artis;

(c) That Bello told that truth when he told Harrelson that he was standing in the hedge at the Lafayette Grill, that he observed Carter and Artis backing out of the front door, Carter with a shotgun and Artis with something in his hand, and that there were no other people at all, only two people backing out of the door;

(d) That Bello's testimony at the 1967 trial was truth and the statement recanting his original statement was not true,

(18) Bello was cross-examined at great length with regard to the contradictory statements he had given. Such versions were explored in an attempt to attack Bello's credibility, any further examination would have been cumulative and repetitious.

CONCLUSIONS OF LAW

THE PROSECUTION DID NOT WITHHOLD MATERIAL EVIDENCE FAVORABLE TO THE DEFENDANT THEREBY VIOLATING THE RULE IN BRADY V. MARYLAND.

The successful establishment of a *Brady* violation requires proof that:

(1) The evidence withheld had been known to the prosecution but unknown to the defense;

(2) The prosecution failed to disclose the evidence;

(3) The evidence was of a favorable character for the defense; and

(4) The evidence was material.

While I shall deal separately with each of the above criteria necessary to establish a *Brady* violation, it should be understood that I reject the false premise underlying the defendant's analysis of the "in the bar" version as being consistent with Carter and Artis *not* being the triggermen.

THE EVIDENCE WITHHELD HAD BEEN KNOWN TO THE PROSECUTION BUT UNKNOWN TO THE DEFENSE

The testimony adduced at the hearing supports the Defendants' contention that Harrelson, after testing Bello, rendered a verbal statement to the prosecution wherein he indicated that Bello had told the truth when he said he was "in the bar" before and during the shootings. The defense has met the threshold determination of prosecutorial knowledge.

I conclude that the evidence the defense charges the prosecution with having suppressed had been known to the prosecution but unknown to the defense.

THE PROSECUTION WAS JUSTIFIED IN THEIR FAILURE TO DISCLOSE THE EVIDENCE TO THE DEFENSE.

The State was aware of the Harrelson oral opinion. The evidence is uncontroverted that the State failed to disclose Harrelson's oral opinion to the defense. However, the area to be explored at this point is whether the oral statement was so tentative an expression of an opinion as to *justify* the prosecution's failure to disclose the information. (See *State v. Carter*, 85 *N.J.* 300, footnote 4 and accompanying text at page 313).

If this inquiry were to be interpreted technically, clearly, the answer would be yes, namely, that the prosecution did not explicitly tell the defense that Harrelson found Bello to be truthful when he said he was "in the bar" prior to and during the shootings. The issue here is whether the prosecution was justified in it's failure to disclose the information not the technical failure to disclose.

After examining Bello, Harrelson told the State's representatives that he believed Bello was telling the truth when he said he was "in the bar" before and at the time of the shootings.

QUERY:

Was this so tentative an expression of opinion so as to justify the prosecution's failure to disclose it to the defense? The State was justified in its's impression that Harrelson's oral report was preliminary or tentative and subject for further review for the following reasons. The prosecution acted in good faith when it decided to have Bello tested. The prosecution"s motive for testing Bello was to ascertain whether Bello was telling the truth when he identified the defendants at the 1967 trial. To further it's purpose the State sought out two leading reputable polygraphists to conduct the test.

Humphreys, in order to obtain an objective and accurate opinion indicated that he was interested in "ascertaining

the truth and prosecuting the guilty, not the innocent". The State intended to use the test as an investigatory tool for the sole purpose of ascertaining the credibility of the State's chief witness at the oncoming trial.

After August 7, 1976, no one from the Prosecutor's office called Harrelson to ask him to reexamine his material and submit a report as to whether or not he believed the "in the bar" version or if the "on the street" version was true.

No one associated with the prosecution attempted to mislead, deceive or pressure Harrelson into reaching a different conclusion. No one had called Harrelson between the date of the test and the date of his report to ask him to explain his findings. In fact, except for the August 11, 1976 telephone conversation with Humphreys, he had no contact with the Prosecutor or his staff until Harrelson called Humphreys to tell him he had been contacted by Beldock and Steel.

Harrelson conceded that the prosecution may have considered the oral statement as a preliminary report because he did say that he would submit a final written report at a later date. On receiving the written report, the State accepted it as valid, accurate and dispositive of the preliminary oral statement.

The final written report's stated conclusion was unequivocal, it stated that Bello's 1966 testimony "is true and the statement recanting his original statement is not true". The final report was consistent with the opinion Harrelson had expressed when he examined the DeMasi charts of Bello wherein he criticized DeMasi's interpretation of the charts and concluded that Bello was not "in the bar" at the time of the shootings.

There is a notation in the written report that following the fifth test given Bello, "the examiner decided to stop the examination immediately", because Bello was com-

plaining of numbness in his left arm. Since it appeared that the test had not been completed, the State was justified in concluding that Harrelson would have to examine his charts before rendering a final conclusion as to whether the 1967 trial testimony was true or the later recantation was true.

In the written report Harrelson revealed that Bello disclosed the involvement of persons such as Selwyn Raab, Fred Hogan and Hal Levinson in the recantation. This supports Harrelson's conclusion that the recantation was not true. The prosecution's first inkling that Harrelson was of the opinion that Bello had told the truth when he revealed to Harrelson that he was "in the bar" occurred when the defense filed motions on the issue after the trial.

At the time of the remand hearing, Harrelson did not equivocate when called upon to explain whether his oral report to Kayne and DeSimone was a preliminary opinion. He explicitely refuted the Prosecutor's contention that this was only a preliminary report.

Harrelson tested Bello on August 7, 1976 and told DeSimone and Kayne that Bello was telling the truth when he said he was "in the bar" prior to and at the time of the shootings. DeSimone expressed his opinion that had Bello been "in the bar" that he would have been killed when the shooting took place.

On August 11, 1976 Prosecutor Humphreys had a lengthy phone conversation with Harrelson wherein Harrelson told Humphreys that he found that Bello was telling the truth when he stated he saw Carter and Artis there and that they had guns in their hands at the time of the murders. Humphreys asked Harrelson about Bello being "in the bar" and Harrelson indicated that he would have to consider that further, look at his charts and he would address that issue in his written report.

Based on the evidence adduced at the remand hearing, I conclude that the prosecution technically failed to disclose

Harrelsons's oral report to the defense counsel. However, the nondisclosure was justified by virtue of the fact that Harrelson's oral statement which was later to be followed by a written report was too tentative of an expression of a final opinion so as to require the prosecution to disclose the oral statement to the defense. Hence, the prosecution was justified in their failure to disclose the evidence to the defense.

THE EVIDENCE WAS NOT OF A FAVORABLE CHARACTER TO THE DEFENSE

The Supreme Court has directed this Court, at the remand hearing, to explore precisely what use the prosecution made of Harrelson's report in confronting Bello on September 14 and September 15, 1976, prior to the second trial.

Prior to the evidentiary hearing, the State took the position that at the September 1976 interview, Bello gave DeSimone and Kayne a detailed account of the various pressures and inducements that resulted in his recantations, explained the basis for his statements to Assemblyman Hawkins and the Essex County Grand Jury and therefore returned to his 1967 trial version of the shootings.

During the course of the 1976 trial, both Prosecutor Humphreys and Assistant Prosecutor Marmo told the Court that the lie detector tests were instrumental in getting Bello back to the "on the street" version. The Supreme Court directed that the hearings on remand should explore how the polygraph report was linked to that result.

> Defendants contend that the apparent error in Harrelson's conclusion, undisclosed to them until after trial, assumes critical significance when considered in light of the use to which the test results may have been put. After receipt of Harrelson's report two representatives of the

prosecution interviewed Bello on September 14 and 15, 1976; and while the record is far from clear on the use, if any, made of the polygraph report during that confrontation, the fact is that at the conclusion thereof Bello retreated from his "in the bar" story and returned to his 1967 account. As we have indicated, Bello's testimony at the second trial was in keeping with this 'on the street' account.

The thrust of defendants' argument is that even though the State did not introduce the polygraph examination and report into evidence, the circumstances surrounding the polygraph procedure and the use made of the report were of 'controlling importance' at the trial. Defense counsel contend that had they known at the time of trial that which they came to know only after the trial, that is, that the lie detector report meant the opposite of what it clearly said, they would have turned the evidence to the defendants' advantage.

State v. Carter, 85 *N.J.* 300 (1981) at pgs. 309-310.

They argue that they could have:

(1) Impeached Bello's testimony; the State's main witness;
(2) Shown that Bello had changed his story through prosecutorial deceit and coersion;
(3) Cross-examined DeSimone on the manner in which he brought Bello back to the "on the street" version.

They suggest that Bello was particularly vulnerable to threats of prosecution for perjury for his 'in the bar' account given in 1975 to an Essex County Grand Jury. They insist moreover, that access to these trial strategems was denied them

> by a 'prosecution-induced' trial court ruling that questioning directed to the State's use of the Harrelson test to 'turn Bello around' would open the door to admission of the purported test results and to Harrelson's testimony supposedly supporting the truth of Bello's 'on the street' story. Hence the defense complains they were 'hamstrung' by the trial court's warning that questions probing the reasons for Bello's change in testimony might permit a discussion of the lie detector results which, on their face, were injurious to defendants but which in fact might have been helpful to them had they been told the truth by the prosecution.

State v. Carter, 85 *N.J.* 300 (1981), at pg. 310.

Hypothetically, the defense argues:

(1) That if the "true" test results had been disclosed the State could not have precluded their cross-examination of Bello as to why he recanted his recantation;

(2) They also would have argued that the real reason for the turn around was the threat of perjury because of his testimony before the Essex County Grand Jury. They contend that Bello had changed his story through prosecutorial deceit and coercion;

(3) They urge that their approach in cross-examining DeSimone would have been different. They would have attacked his credibility by showing that DeSimone had misrepresented the test results to get Bello to the version to which he wanted Bello to testify just as he had done in 1966 by withholding a taped interview of Bello.

Presumably them, the defense argues they would have impeached Bello's testimony by cross-examining him as to

his statement to Harrelson as evidenced by Harrelson's written report and the fact that Harrelson had found him to be telling the truth when he said he was "in the bar" prior to and at the time of the shootings.

The defense alleges that they would have cross-examined Bello and DeSimone to show that Bello's test results were influenced by prosecutorial deceit and coercion. They further contend the they would have utilized Harrelson's written reports and lie detector test results to show the manner in which these exhibits were used during the September interviews of Bello by Kayne and DeSimone.

On the surface these contentions would indicate that the evidence in question was considered favorable to the defense to some degree, thereby resulting in an affirmative answer in deciding whether the evidence was of a favorable character to the defense.

However, an analysis, in the forthcoming section on materiality, of the testimony and evidence adduced at the remand hearing, the pleadings and references to the 1976 trial transcripts, not only *negates* the defendants' contentions, that the withheld evidence was of a favorable character to the defense, but in fact, proves that the disclosure of such evidence would have been devastating to the defense.

THE NONDISCLOSED EVIDENCE WAS IMMATERIAL.

The next inquiry which must be addressed is whether or not the evidence was material within the purview of *Brady v. Maryland*, 373, *U.S.* 83 (1963), and it's progeny.

In the instant case it is undisputed that the defense made a specific request for all information concerning Bello's polygraph tests. Hence, assuming that the prosecution did technically suppress information favorable to the defense, and assuming further that the prosecution was not justified in withholding the information regarding the oral results of Bello's polygrapy test; the question of materi-

ality for *Brady* purposes becomes whether the suppressed evidence "might have affected the outcome of the trial". *United States v. Agurs,* 427 *U.S.* (1976) at pg. 104.

I find that the prosecution's nondisclosure of Harrelson's oral preliminary statement that Bello was "in the bar" at the time of the shootings in no way could have affected that outcome of the trial, for the following reasons:

(1) Harrelson's preliminary oral statement was consistent with his subsequent written report, i.e., that he believed Bello to be telling the truth when Bello revealed to Harrelson that two men committed the murders, and that Bello could positively identify those two men as Carter and Artis;

(2) The prosecution did not use the results of Harrelson's oral preliminary statement to "turn Bello around" to testifying as to the "on the street" version;

(3) Assuming that Harreloson's preliminary oral statement was consistent with his subsequent written report, the only conceivable purpose for which the defense could have used the evidence would been to impeach Bello and hence merely cumulative or repetitious.

As previously pointed out at the outset of this opinion, the defendants are under the false premise that Harrelson's preliminary oral statement is inconsistent with and in opposition to his subsequent written report. This is an unacceptable analysis of the evidence in this case.

The defendant's principal contention is that the State suppressed evidence and/or *Brady* material when the State failed to disclose to defense counsel, Harrelson's oral statements, wherein, subsequent to his examination of Bello's Harrelson revealed to the prosecution that he believed Bello to be telling the truth when he said he was "in the bar" before and after the shootings.

In it's opinion, the Supreme Court specified that the common ingredient of the "in the bar" narrative, as distinguished from the so-called "on the street" version, presented an account in which Carter and Artis were *not* the triggermen.*State v. Carter,* 85 *N.J.* 300 (1981) at pg. 306.

The defense has argued that if an evidentiary hearing were conducted, Harrelson would testify that he obtained from Bello one of the variations of the "in the bar" narrative, wherein two black men-not Carter and Ardtis- entered through the side door and began shooting and as Bello ran out of the bar and around the corner, he saw Carter and Artis on the sidewalk, either armed or unarmed.

However, at the remand evidentiary hearing, Harrelson did not testify as to ever having made any such representation to the defense nor anyone else. Harrelson testified that based on his discussions and examination of Bello, that he concluded that Bello was telling the truth when Bello divulged to Harrelson that Carter and Artis were the triggermen, i.e., the two-man version. Therefore, Harrelson's testimony would in fact, have been devastating to the defense. Consequently, the defendants' premise is false.

It is true that Bello revealed to Harrelson that he was "in the bar" and subsequently Harrelson gave a preliminary oral statement to the prosecution that in Harrelson's opinion Bello was telling the truth as to that fact. However, that was not the only fact Bello revealed to Harrelson which Harrelson has accepted as true, Bello also divulged to Harrelson the two men committed the murders and that Bello could positively identify the triggermen as Carter and Artis.

The account which Harrelson obtained from Bello is not consistent with the so-called "in the bar" version where the common ingredient was that two black men—not Carter and Artis—were the triggermen but rather con-

sistent with Bello's 1967 trial testimony wherein Bello positively identifies Carter and Artis as the triggermen, i.e., the two-man version.

The Supreme Court specifically directed the Trial Court, on remand, to explore "precisely what use the prosecution made of Harrelson's report in confronting Bello" on September 14, and 15 of 1976 prior to the second trial, and more specifically how the polygraph report was linked, if at all, to Bello's repudiation of his 1974 recantation.

The State acted in good faith when it decided to have Bello undergo a polygraph test. The prosecution's only motive for testing Bello was to ascertain whether or not Bello was telling the truth when he identified Carter and Artis as the triggermen in the 1967 trial. This is evidenced by Humphreys' uncontradicted testimony that the State's only interest was in ascertaining the truth and prosecuting the guilty, not the innocent.

Furthermore, the State in no way misrepresented the results of Harrelson's test in order to coerce Bello to turn State's evidence, and the threat of perjury was never used by the prosecution to "turn Bello around" to testifying as to the "on the street" version.

Prior to the confrontation between Bello and prosecution on September 14 and 15 of 1976, Bello had already recanted his recantation and returned to his 1967 two-man version wherein Bello positively identified Carter and Artis as the triggermen. This is evidenced by the fact that Bello told Harrelson in the pre-test interview that the recantation was fabricated and further revealed the various pressures and inducements put on him by Hogan, Raab and Levinson to recant his 1967 trial testimony.

Moreover, at the 1976 trial Bello admitted that the recantation and the "in the bar" versions were totally fictionalized. Hence, it was not the prosecution who persuaded or coerced Bello to recant his recantation but rather Bello

chose to repudiate the recantation during his interview with Harrelson, because Bello knew that he polygraph test would be able to detect when and if he was lying. Consequently, the polygraph test was used to bring Bello back to his original two-man version.

Lastly, in determining the question of materiality for *Brady* purposes, I find no merit to the defendants' contentions that the oral statement by Harrelson, if disclosed, might have affected the trial result. Assuming that Harrelson's preliminary oral statement was not consistant with his subsequent written report, the only purpose for which the defense could have used the evidence would have been for impeachment purposes. Hence, the undisclosed information was merely cumulative and/or repetitious as to the purpose for which it could have been used and not violative of the *Brady* rule, *DeMartino v. Weidenburner*, 616 *F. 2d* 708, at pg. 711 (3rd Cir., 1980)

A new trial is not automatically required whenever a combing of the prosecution's files after trial discloses evidence possibly useful to the defense but not likely to have changed the verdict, *Giglio v. United States*, 92 *S.* 763 at pg. 766 (1972).

In conclusion, I find that the prosecution's nondisclosure of Harrelson's preliminary oral report in no way would or could have affected the outcome of the second Carter-Artis trial.

THE NEWLY DISCOVERED EVIDENCE DOES NOT WARRANT A NEW TRIAL

The inquiry at this juncture is whether or not the information developed since trial regarding the circumstances surrounding the polygraph test constituted such newly discovered evidence so as to warrant a new trial on the merits.Here, the inquiry is whether or not the post-trial revelation that Harrelson's report did not mean what it purported to say, constitutes such newly discovered evidence so as to justify a new trial.

To qualify as newly as discovered evidence entitling a party to a new trial, the new evidence must be:

(1) Material to the issue and not merely cumulative, impeaching or contradictory;

(2) Discovered since the trial and not discoverable by reasonable diligence beforehand;

(3) Of the sort that would probably change the jury's verdict if a new trial were granted.

State v.Artis, 36 *N.J.* 538 (1962) at pg. 541. All three tests must be met before the evidence can be said to justify a new trial. *State v. Johnson*, 34 *N.J.* 212 (1961) at pg. 222.

This remand has determined that the alleged post-trial revelation (that Harrelson's report did not mean what it purported to say) was a myth. Both Harrelson's oral, preliminary, nondisclosed statement and later written report are consistent. However, assuming that the alleged post-trial revelation did create an ambiguity and did not mean what it purported to say, a new trial is not warranted because the new evidence is not material; could have been discovered by the defense before the onset of the trial, had the defense been reasonably diligent and, lastly, is not the sort of evidence that would have changed the jury's verdict if a new trial were granted.

As previously indicated by this Court, the post-trial revelation that Harrelson's report did not mean what it purported to say, is merely cumulative and/or repetitious as to the purpose for which it could have been used at trial and hence immaterial. At best, under the newly discovered evidence test, the evidence was cumulative or, giving the defendants the benefit of the doubt, contradictory. However, even if the evidence is viewed as contradictory this is not sufficient to satisfy the stringent newly discovered evidence test. The new evidence must be "material to the issue" of innocence or guilt. The post-trial discovery that

Harrelson's report did not mean what it purported to say, does not meet the stringent materiality test of newly discovered evidence.

I will now consider whether or not her post-trial discovery was of a sort which would probably change the jury's verdict in the event of a new trial.

Essentially, the reasons why the suppressed evidence could/would not have affected the outcome of the trial are the same reasons why the post-trial discovery would not have changed the jury's verdict in the event of a new trial, namely:

(1) Harrelson's preliminary oral statement was consistent with his subsequent written report and hence the alleged post-trial revelation that Harrelson's report did not mean what it purported to say was not fact but fiction.

(2) Assuming that Harrelson's preliminary oral statement was inconsistent, with his subsequent written report, and that the report did not mean what it purported to say, at best, the evidence was cumulative and/or contradictory and certainly not the sort which would probably change the jury's verdict if a new trial were granted.

Finally, the "due diligence" element of the newly discovered evidence test will be analyzed. The defense counsels' contention that they acted with reasonable diligence is inconsistent with the record and hence without merit.

At the remand hearing both Beldock and Steel testified on the issue of their due diligence. Their testimony indicated that when they received Harrelson's written report on September 14, 1976, they understood it to mean exactly what the conclusion stated, that Bello's original 1967 trial testimony was true, and that the statement recanting his original statement was not true.

The defense contends that the first time they learned that the prosecution may have had a litigation use for the report, i.e., to block the defense's cross-examination of Bello, on the issue of how he returned to his original 1967 version, was on November 18, 1976.

However, prior to the 1976 trial on September 1, 1976 the Witherspoon article appeared in the New York Daily News referring to certain key prosecution witnesses being unable to pass polygraph tests on their testimony that Carter and Artis actually committed the killings

.Defense counsel were aware of the potential significance of this article, if true, with regard to the upcoming 1976 trial. This is evidenced by the fact that the defense, on September 8, 1976, argued a motion for a change of venue and dismissal of the indictment, wherein they referred to the article containing the information about the results of Bello's polygraph test as being "highly significant".

On September 14, 1976 the defense received Harrelson's written report wherein his conclusion stated that Bello was being truthful when he identified Carter and Artis as the triggermen. Furthermore, the report did not indicate which answers were true or false in response to the series of test questions prepared by Harrelson.

The controversial Witherspoon article taken by itself was enough to put the defense counsel on notice that it would be in the defendants' best interest to interview Harrelson, Bello or both. Certainly, the article coupled with the seemingly inconsistent written report gave due notice to the defense counsel to take immediate action. However, the defense counsel failed to pursue the matter.

During the trial, on November 18, 1976, when Humphreys objected to defense counsel's line of cross-examination pertaining to Bello's meeting with members of the Prosecutor's staff, the Prosecutor advised the Court that

the polygraph test had been used to "turn" Bello around to his 1967 trial testimony. The defendants did not seek a continuance to interview Harrelson nor make a request to *voir dire* Bello, DeSimone or Kayne in order to ascertain how the State used the polygraph test to return Bello to the "on the street" version.

Therefore, I find that there is not merit to the defense counsels' contention that they acted with reasonable diligence in exploring the alleged newly discovered evidence.

CONCLUSION

On the basis of the remand evidentiary hearing, the record as a whole, and all other relevant and material evidence disclosed since the trial, I find that no new trial is warranted under *Brady v. Maryland, supra,* nor under the newly discovered evidence approach.

The motion for a new trial is denied.

STATE'S EXHIBITS

S-1000 Letter from Humphreys to Harrelson dated 7/26/76

1001 Letter from Harrelson to Humphreys dated 7/27/76

1001 Richard O. Arther curriculum vitae

1003 Arther's letter of consent dated 9/30/76

1004 Arther's repoort of Bello's test

1005 Letter from Arther to V. DsSimone dated 10/4/76

1006 Arther's itemized bill (10/43/76)

1007 Arther's pre-test notes (9/30/76)

1008 Arther's polygraph charts

1009 Arther's background information on Bello

1010 Letter from DeSimone to Arther dated 9/2/76

1011 Arther's question form

1012 Arther's test questions

1013 Harrelson's notes

1014 Harrelson's notes pertaining to DeMasi test

1015 Bello's affidavit (3/18/67)

1016 Newspaper article (9/2/76)

1017 Phone memo on Arther's pad (8/9/76

1018 Arther's notes

1019 Arther's notes (re: trip to New Mexico)

1020 Arther's notes

1021 Arther's notes

1022 Arther's notes

1023 Voucher (Arther's)

1024 Humphreys' memo (9/9/76)

1025 Letter from Humphreys to Harrelson dated 9/9/76

1026 Letter from Humphreys to Harrelson dated 9/13/76

1027 Letter from Kayne, Re: discovery items (9/14/76

1028 Bello's affidavit (8/10/76)

1029 Kayne affidavit, Re: Bello (9/29/76)

1030 Beldock's notes, Re: conversation with Miller

1031 Beldock's notes (10/31/75)

1032 News release (5/25/78)

1033 Transcript 9/1/76

1034 Transcript 9/8/76

1035 Defense pleadings filed with Appellate Division

1036 Not in evidence (Witherspoon documents)

1037 Not in evidence (Witherspoon documents)

1038 Not in evidence (Witherspoon documents)

STATE EXHIBITS

Please note:

Exhibits—S1000 thru S1032 inclusive are enclosed

Exhibits—S1033 thru S1038 are not enclosed

Nos. S1033, 1034, 1035 are on file with the Clerk of the Court

Nos. S1036, 1037, 1038 were not marked in evidence

ARTIS EXHIBITS

DA-1101 Kayne's Report (9/20/76)

1102 Kayne and De Simone's report (9/24/76)

1103 DeVesa's Memo (6/21/76)

1104 Court transcript (material witness) 8/6/76

1105 Trial transcript 11/18/76

1106 Daily New article 9/1/76

1107 Lie test report (Haggins) 8/24/76

1108 Harrelson's report (6/30/77)

1109 Letter from Humphreys to Attorney General 7/27/76

1110 Memo—DeMasi to Lordi (12/23/75)

1111 Memo—Lordi to DeMasi (12/11/75)

1112 Humphreys' memo 8/3/76

1113 Letter—Arther to Steel dated 5/3/74

1113A Report (Maynard case) 4/20/74

1114 State brief with documents (6/16/78)

1115 Transcript—Appellate Division (6/30/80)

1116 Memo—Kayne to Humphreys (9/20/76)

1117 Letter—Humphreys to Attorney General dated 9/15/76

1118 Letter—To Fogel from Criminal Assignment Clerk setting October 12 as trial date

1119 Letter from Humphreys to Attorney General dated 11/22/76

1121 Letter—Humphreys dated 1/20/77

1122 Not in evidence (tape between Kayne and Kelly)

1123 Memo—Kayne to Humphreys 8/2/76 thru 8/19/76

1124 Recca Memo (9/27/76)

1125 Bergen Record News article

1126 Letter from Steel to Harrelson dated 7/6/77

1127 Letter from Harrelson to Steel dated 7/14/77

ARTIS EXHIBITS

Exhibits Nos. DA-1101 thru DA-1118 inclusive enclosed

No. DA-1119 on file with the Clerk of the Court

Nos. DA-1120 and 1121 enclosed

Nos. DA-1124 thru 1127 inclusive, enclosed

CARTER EXHIBITS

DC-1201	Travel invoice, Re: Bello (9/24/76)
1202	Harrelson's report (8/24/76)
1203	Harrelson's notes (8/7/76)
1204	Harrelson's telephone records
1205	Letter from Harrelson to Arther dated 8d/25/76
1206	Letter from Arther to Harrelson dated 10/25/76
1207	Letter from Prosecutor to Harrelson dated 8/12/76
1208	Red record book (photocopy)
1209	Yellow pad (photocopy)
1210	Red composition book (photocopy)
1211	Calendar notations (8/11/76)
1212	Transcript of Humphrey's interview (4/9/81)
1213	Memo, Re: discussions between DeSimone and Arther (8/18/76)
1214	Memo, Re: DeSimone to Humphreys (8/23/76)
1215	Letter Arther to DeSimone dated 9/10/76
1216	Memo, Re: DeSimone to Humphreys (11/19/76)

1217 Letter from Beldock to Marmo dated 1/11/78

1218 Letter from Marmo to Beldock dated 1/24/78

1219 Transcript of Court proceedings (1/11/78)

1220 Voucher (airplane)

1221 Voucher

1222 Order (Witherspoon)

1223 Order (Witherspoon)

1224 Trial transcript (11/8/76)

1225 Witherspoon affidavit

1226 Memo—Caruso to Marmo (8/2/76)

1227 Memo—Caruso to Marmo (9/16/76)

1228 List of telephone numbers

1228A Directory (Prosecutor's Office)

1229 Notes, Re: Kayne's interview of Witness

1230 Caruso's file (seal and impounded)

1231 Court Clerk's minutes (11/18/76)

1232 Court transcript (11/19/76)

1233 Court transcript (11/22/76)

1234 Beldock's memo dated 5/10/77

1235 Beldock's memo, Re: Harrelson's interview

1236 Affidavit (Cassidy) 5/6/81

1237 Affidavit (Mrs. Coleman) 5/18/81

CARTER EXHIBITS

Exhibits Nos. DC-1201 thru 1210 inclusive are enclosed

No. DC-1211 (not in evidence)

Nos. DC-1212 thru 1218 inclusive are enclosed

No. DC-1219 is on file with the Clerk of the Court

Nos. DC-1220, 1221, 1223 are enclosed

No. DC-1224 on file with the Clerk of the Court

Nos. DC-1225 thru 1229 inclusive are enclosed

No. DC-1230 (Caruso file) impounded—not enclosed. (Will await Court's direction)

Nos. DC-1231 thru 1237 inclusive are enclosed

APPENDIX E

JOSEPH A. FALCONE
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR RESPONDENTS
NEW COURT HOUSE
PATERSON, NEW JERSEY 07505
(202) 881-4800

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION

Docket No. 84-745

NOTICE OF APPEAL

RUBIN CARTER,

Petitioner,

VS.

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents.

Docket No. 85-1007

JOHN ARTIS,

Petitioner,

VS.

CHRISTOPHER DIETZ, Chairman, Patrol Board of the State of New Jersey and IRWIN I. KIMMELMAN, The Attorney General of the State of New Jersey,

Respondents.

ORIGINAL FILED

NOV 8-1985

ALLYN Z. LITE, Clerk

Notice is hereby given that John J. Rafferty, Superintendent, Rahway State Prison, Christopher Dietz, Chairman, Parole Board of the State of New Jersey, and Irwin I. Kimmelman, Attorney General of the State of New Jersey, respondents above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the order granting petitioner Carter's habeas corpus petition and releasing petitioner Carter from the custody of the State of New Jersey entered in this action on the 8th day of November, 1985.

JOSEPH A. FALCONE
Passaic County Prosecutor
New Court House
Paterson, New Jersey 07505
Attorney for Respondents

By: /s/ JOHN P. GOCELJAK
JOHN P. GOCELJAK
First Assistant Prosecutor

APPENDIX F

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

November 15, 1985

JOHN P. GOCELJAK, Esq. (Member)
1st Asst. Prosecutor
JOSEPH A. FALCONE, Esq.
Passaic County Prosecutor
New Court House
Paterson, New York 07505

Re: RUBIN CARTER, et al.

vs.

JOHN J. RAFFERTY, etc.
(D.C. Civil No. 85-0745)

JOHN ARTIS

vs.

CHRISTOPHER DIETZ, etc., et al.
(D.C. Civil No. 85-1007)

JOHN J. RAFFERTY, etc., et al.,

Appellants.

No. 85-5735

Dear Counsel:

This is to advise you that the appeal in the above-captioned case has been docketed in this Court on November 8, 1985 at No. 85-5735.

Pursuant to Rule 10(b), F.R.A.P., within (10) days of the filing of the notice of appeal, you must order from the court reporter those portions of the trial transcript which

relate to the issues to be raised on appeal. If you have not already done so, you should give this matter your immediate attention. When the record is complete for purpose of the appeal and has been transmitted to this office from the District Court, you will receive a briefing order.

Within ten (10) days of the date of this letter, the following enclosed forms must be completed and forwarded to this office:

(1) Entry of Appearance Form:
(2) Civil Appeal Information State (to appellant only);
(3) Rule 24 corporate affiliate/financial disclosure statement (original and six copies to be filed).

Our records indicate that the filing and docketing fees have not been paid in the District Court as required by Rule 3(e) F.R.A.P. This will also serve as notice that if the docketing fee is not paid *within fourteen (14) days* of the date of this letter, the appeal will be *dismissed* without further notice pursuant to Rule 28(1) of the local rules.

You are urged to give this matter your immediate attention.

Very truly yours,

SALLY MRVOS, Clerk

By: /s/ JACQUELINE A. SINIBALDI
JACQUELINE A. SINIBALDI
Direct Dial—597-5011

SM: jas:ep
Enc.

cc: Ronald J. Busch, Esq.
99 Bayard Street
New Brunswick, NJ 08903

Lewis M. Steel, Esq. (Member)
Steel & Bellman

351 Broadway
New York, NY 10013

Leon Friedman, Esq.
Hofstra University Law School
Hempstead, New York 11550

Myron Beldoc, Esq.
Levine & Hoffman
565 Fifth Avenue
New York, NJ 10017

Louis S. Ravenson, Esq. (Member)
Rutgers Urban Legal Clinic
15 Washington Street
Newark, NJ 07102

Allyn Z. Lite, Clerk
Newark, NJ

APPENDIX G

STEEL & BELLMAN, P.C.
Attorneys at Law
351 Broadway, New York, New York 10013
(212) 225-7400

RICHARD F. BELLMAN
LAWLE M. STEEL
SUSAN RITZ

January 22, 1986

MS. SALLY MRVOS
Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Pheladelphia, Pennsylvania 19106-1790

Re: **John Artis v. Dietz, et al., No. 85-5735**

Dear Ms. Mrvos:

I represent John Artis. As far as I am aware, no notice of appeal has been filed which would place the above entitled matter before this Court. My client was the petitioner in a *habeas corpus* proceeding which was consolidated with the petition brought by Rubin Carter. The decision of the Hon. H. Lee Sarokin, which was filed on November 7, 1985, deals with both petitions. Thereafter, on November 8, 1985, the district court entered separate orders in behalf of John Artis and Rubin Carter granting each petition. On the same date, the Passaic County Prosecutor filed a notice of appeal which contained both captions. That notice of appeal states:

> Notice is hereby given that John J. Rafferty, Superintendent, Rahway State Prison, Christopher Dietz, Chairman, Parole Board of the State of New Jersey,

> and Irwin I. Kimbelman, Attorney General of the State of New Jersey, respondents above named, hereby appeal to the United States Court of Appeals for the Third Court [sic] from the order granting petitioner Carter's *habeas corpus* petition and releasing petitioner Carter from the custody of the State of New Jersey entered in this action on the 8th day of November, 1985.

This notice of appeal is effective only with regard to Rubin Cater as the content of the notice, which must conform the Rule 3(c) of the Federal Rules of Appellate Procedure, designates only the Carter orders as being those appealed from. This notice of appeal does not refer to petitioner Artis in the body of the appeal nor does it refer to the order granting Artis' petition for writ of *habeas corpus*. Moreover, more than 60 days have passed since the entry of the order granting Artis' petition on November 8, 1985. The time limits provided by the Federal Rules of Appellate Procedure with regard to the filing of notices of appeal are mandatory and jurisdictional. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257; *West v. Keve*, 721 F.2d 91, 97 (3d Cir. 1983).

Respondents, of course, should have filed a notice of appeal with regard to Artis, if that was their intention, within 30 days of entry of the order to be appealed. Rule 4(a)(1), F.R.App.Pro. Pursuant to Rule 4(a)(5), respondents could have moved, based upon excusable neglect or good cause, for permission to file their notice of appeal during an additional 30 day period after the 30 day period in which to appeal had run. After the expiration of this second 30 day period, however, no further extension of time may be given, and jurisdiction is lost. See *Herman v. Guardian Life Ins. Co. of America*, 762 F.2d 288, 289 (3d Cir. 1985); *Sofarelli Associates, Inc. v. The United States*, 716 F.2d 1395, 1396-7 (Fed. Cir. 1983), in which the court analyzed Rule 4(a)(5) and found that an application for additional

time could not be filed after the 30 days "excusable neglect" period had run. See also 9 Moore's *Federal Practice*, ¶204.13[2] at 4-104 (1983).

Under all the above circumstances, it is clear that this Court does not have jurisdiction to entertain this appeal with regard to my client. I would therefore request that this Court inform the parties that John Artis is not a party to the proceedings in this Court, and that therefore the order of the district court granting his petition is final.

Mr. Bradford Baldus of your staff informed me that this Court may wish to treat this letter as a motion to dismiss the appeal against Mr. Artis, and instructed me to file an original and three copies. A copy of this letter has been served by first class mail on John A. Falcone, Esq., Attn. John P. Goceljak, Esq., Passaic County Prosecutor, who is representing the respondents in this Court. A copy of this letter has been served by first class mail upon Myron Beldock, Esq., attorney for Rubin Carter.

Respectfully submitted,

STEEL & BELLMAN, P.C.

By: LEWIS M. STEEL
LEWIS M. STEEL

LMS:PC
cc: John A. Falcone, Esq.
Myron Beldock, Esq.
Leon Friedman, Esq.

APPENDIX H

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
– FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

JOHN P. GOCELJAK, Esquire
RONALD G. MARMO, Esquire
Passaic County Prosecutor's Office
New Courthouse
Paterson, NJ 07505

LEON FRIEDMAN, Esquire
148 East 78th Street
New York, NY 10021

MYRON BELDOCK, Esquire
Beldock, Levine & Hoffman
565 Fifth Avenue
New York, NY 10017

Re: **Rubin Carter, et al. vs. John J. Rafferty, et al.**
No. 85-5735

Dear Counsel:

Enclosed herewith is conformed copy of order entered by the Court today in the above-entitled case which reads as follows:

> "The foregoing motion by Artis to dismiss appeal is referred to the merits panel. Carter's motion to limit the appendix to matters of record before the district court is granted. If the parties are unable to agree on what was before the district court within ten days the matter will be referred to that court for a determination."

Very truly yours,

SALLY MRVOS, Clerk

By: /s/ FRANCES R. MATYSIK
FRANCES R. MATYSIK, Deputy Clerk

ad
enc.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-5735

RUBIN CARTER and JOHN ARTIS

vs.

RAFFERTY, et al.
(NJ D.C. Civil No. 85-0745)

JOHN ARTIS

vs.

DIETZ, et al.
(NJ D.C. Civil No. 85-1007)

RAFFERTY, et al,

Appellants

February 27, 1986

Present: GIBBONS, HIGGINBOTHAN and BECKER, *Circuit Judges.*

1. Letter-motion from Lewis M. Steel, Esquire, counsel for John Artis, stating that the notice of appeal does not refer to petitioner Artis in the body of the appeal nor does it refer to the order granting Artis' petition for writ of *habeas corpus*, with request that this Court inform the parties that John Artis is not a party to the proceedings in this Court, and that, therefore, the order of the district court granting his petition is final, which the Court may wish to treat as a motion to dismiss appeal against John Artis, as shown in the caption as:

   JOHN ARTIS vs. DIETZ, et al. (NJ D.C. Civil No. 85-1007)

2. Appellants' reply (in opposition) to motion to dismiss appeal as to John Artis,
3. Letter dated February 10, 1986, from appellee, John Artis, in response to appellants' Reply to Motion to Dismiss Appeal as to John Artis,
4. Motion by appellee, Rubin Carter, for an Order directing appellants to strike material not of record from appendix and to otherwise comply with F.R.A.P. 10 and 30, *with* Designation of Additional Parts of Record to be included in appendix and objections to material not before the district court designated by appellants,
5. Supplemental Affidavit of Myron Beldock, counsel for appellee, Rubin Carter, in support of Motion for an Order Directing Appellants to Strike Material, etc., in the above-entitled case.

Respectfully,

/s/ ARPI DERATYERRIAN
Deputy Clerk 7-3080

enc.
FM:ad/hb

The foregoing Motion by Artis to dismiss appeal is referred to the merits panel. Carter's motion to limit the appendix to matters of record before the district court is granted. If the parties are unable to agree on what was before the district court within ten days the matter will be referred to this court for a determination.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: March 25, 1986
ad/cc: (John P. Goceljak, Esq.
Leon Friedman, Esq.
Myron Beldock, Esq.

APPENDIX J

STEEL & BELLMAN, P.C.
Attorneys at Law
351 Broadway, New York, New York 10013
(212) 925-7400

RICHARD F. BELLMAN
LEWIS M. STEEL
SUSAN RITZ

April 15, 1986

Ms. SALLY MRVOS
Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadephia, Pennsylvania 19106-1790

Re: **Rubin Carter, Petitioner-Appellee v. John Rafferty, et al., Respondents-Appellants**
John Artis, Petitioner-Appellee v. Christopher Dietz, et al., Respondents-Appellants

No. 85-5735

Dear Ms. Mrvos:

In light of the decision of the Court dated February 27, 1986 (B-109) to refer my motion on behalf of John Artis to dismiss the appeal to the Merits Panel, I am hereby entering my notice of appearance and returning the Court's disclosure form. By entering a notice of appearance, I do not waive the issue raised in the motion to dismiss.

Appellee Artis will file joint papers with appellee Carter and joins in the motions heretofore made by appellee Carter relating to the record, etc. This is being done to avoid delay in the event that the Panel determines to hear the Artis case on the merits, rather than dismissing the appeal based upon the jurisdictional issue.

A copy of this letter has been sent to John P. Goceljak, acting Passaic County Prosecutor, and Myron Beldock, attorney for appellee Carter.

Very truly yours,

/s/ LEWIS M. STEEL
LEWIS M. STEET

LMS:PC
cc: John P. Goceljak
Myron Beldock

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5735

JOHN ARTIS,

Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, et al.,

Respondents-Appellants

DISCLOSURE OF CORPORATE AFFILATIONS AND FINANCIAL INTEREST

Pursuant to Local Rule 25, LEWIS M. STEEL makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   (Check One) [ ] Yes [X] No

   If the answer is YES list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interst in the outcome?

   (Check One) [ ] Yes [X] No

   If the answer is YES, list below the identify of such corporation and the nature of the financial interest:

_____ April 14, 1986
(Signature of Counsel) (Date)

SEE REVERSE SIDE FOR INSTRUCTIONS

APPEARANCE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN ARTIS,
Petitioner-Appellee,

vs.

CHRISTOPHER DIETZ, et al.,
Respondents-Appellants

No. 85-5735

The Clerk will enter my appearance for the Petitioner-Appellee, John Artis.

(sign) /s/_____
Type or Print Name LEWIS M. STEEL
Law Firm STEEL & PELLMAN, P.C.
P.O. Address 351 Broadway
New York, New York 10013
Telephone number (212) 925-7400

U.S GOV'T F.T.S.TEL. NUMBER, IF APPLICABLE

No. 87-888

Supreme Court, U.S.
FILED
DEC 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, the Attorney General of the State of New Jersey,

Petitioners.

vs.

RUBIN CARTER and JOHN ARTIS,

Respondents.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey, and IRWIN I. KIMMELMAN, the Attorney General of the State of New Jersey,

Petitioners.

vs.

JOHN ARTIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:
MYRON BELDOCK
BELDOCK, LEVINE & HOFFMAN
99 Park Avenue
New York, New York 10016

LEWIS M. STEEL
STEEL, BELLMAN & LEVINE
351 Broadway
New York, New York 10013

LEON FRIEDMAN
Hofstra Law School
Hempstead, New York 11550
(212) 737-0400
Counsel of Record

Attorneys for Respondents

QUESTIONS PRESENTED

1. Should this Court grant certiorari on the question of whether materiality determinations made by a state court relating to the exercise of judgment as to whether a *Brady* violation undermined confidence in the outcome of the proceedings, is a factual question subject to the presumption of correctness, in the face of the fact that precisely the same issue was held by this Court to be a mixed question of law and fact in the context of an ineffectiveness claim and every federal court that has considered the issue has found it to be a mixed question?

2. Should this Court review a 92-volume, 20,000 page record to review a finding that a material violation of *Brady* occurred, which finding was made by a unanimous Court of Appeals and the District Court which granted a writ of habeas corpus?

3. Should this Court review a superfluous issue relating to the failure to file a Notice of Appeal with respect to one Respondent whose writ of habeas corpus was granted on the merits in any event?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Preliminary Statement

Petitioners present a narrow and sanitized version of the 21-year history of this controversial case, suggesting that this is an instance where federal courts overturned the state conviction of an obviously-guilty party as a result of some inadvertent technical violation. The reality, however, is otherwise. A unanimous Court of Appeals and the District Court agreed with, and quoted verbatim, the strongly-worded conclusion of the three dissenting justices of the New Jersey Supreme Court, that the State withheld from the defense evidence which had

> the real capacity ... to bring about the utter destruction of by far the most important witness in the State's arsenal, with the fallout ... casting doubt on the tactics of the prosecution [.] *State v. Carter*, 91 N.J. 86, 139, 449 A.2d 1280, 1309 (1982) (Clifford, J., dissenting).

Carter v. Rafferty, 826 F.2d 1299, 1309 (3rd Cir. 1987), (Pet. App. 20a)*; *Carter v. Rafferty*, 621 F.Supp. 533, 548 (D.C.N.J. 1985), (Pet. App. 53a).

The federal courts here have fulfilled the ultimate purpose of the habeas corpus writ, namely, as a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty," *Stone v. Powell*, 428 U.S. 465, 491-92, n. 31 (1976). At every step of this tortured case, respondents have adamantly asserted their complete innocence of the charges and have vigorously pursued their remedies through the state and federal courts, presenting substantial evidence to show that they were in fact innocent and that they were found guilty only because of serious constitutional errors at trial. Respondents' position has been repeatedly endorsed by reviewing courts.

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* The following citation abbreviations are used: "Pet." for the Petition for a Writ of Certiorari; "Pet. App." for the Appendix to the Petition; and "A.____" for the joint appendix in the Court below.

The first trial was marked by the prosecution's manipulation of its two principal witnesses, Bello and Bradley, their perjury, and the massive suppression of exculpatory evidence, culminating in the New Jersey Supreme Court's unanimous reversal of the 1967 verdict on *Brady* grounds. See *State v. Carter*, 69 N.J. 420, 354 A.2d 627 (1976).

The second trial likewise depended on the prosecution's continued use and manipulation of the monumentally untrustworthy Bello -- "hardly a model of rectitude to begin with", according to the New Jersey Supreme Court. *State v. Carter*, 85 N.J. 300, 307, 426 A.2d 501 (1981). Bello was the only witness in the 1976 retrial to claim respondents were at the scene, and the Prosecutor conceded that without his testimony, the State had "a weak *prima facie* case." (A.3C667) Yet between the two trials, Bello had given numerous sworn contradictory versions of where he was and who and what he saw. The post-trial revelations concerning the role of erroneous polygraph results in the molding of Bello's testimony for the second trial definitively demonstrated his absolute unreliability and malleability. As expressed by the three dissenting New Jersey Supreme Court justices:

> A more egregious *Brady* violation than the one presented by this case is difficult to imagine. ...the State withheld from the defendants material evidence favorable to them in connection with the Harrelson polygraph and, unknown to defendants and their counsel, compounded the error by using the mistaken and erroneous polygraph to get the prime witness against the defendants to change his story again and go back to his original testimony given at the first trial. That all adds up to a deprivation of due process and requires a reversal of defendants' convictions.

State v. Carter, 91 N.J. at 133 (Pet. App. 124a). The District Court (Pet. App. 50a-74a) and the Court of Appeals for the Third Circuit (Pet. App. 3a-21a) reached the same conclusion.

These courts also noted the sharp dispute over the evidence (Pet. App. 19a-20a, 65a-74a). According to the District Court, which carefully reviewed the voluminous record (the appendix in the Third Circuit alone consisted of 92 volumes and 20,000 pages),

every element of the State's case was "frayed" and "substantially called into question" (Pet. App. 66a, 74a). The *Brady* information was thus material not only in light of the centrality of Bello's testimony, but also because of the fragility of the State's case against respondents as a whole.

The retrial also featured the prosecution's introduction of the unconstitutional and totally unfounded theory of racial revenge which the District Court ruled a separate basis for the grant of the writs of habeas corpus (see Pet. App. 31a-50a), but which was not examined by the Third Circuit and is not under review at this time. That ruling would require the grant of the writs even if the Court adopted petitioners' position on the questions presented here. This racial motive theory, with no basis in the facts or the law, necessarily obscured the glaring weaknesses in the State's case.

Given that this Court's function is not to reexamine facts already scrutinized so carefully by the courts below, petitioners now resort to the contention that a novel legal issue is presented in the decision below; namely, whether a state court's conclusion that a *Brady* violation was not material is subject to a presumption of correctness under 28 U.S.C. § 2254(d). That question, however, was resolved by *Strickland v. Washington*, 466 U.S. 668, 698 (1984), where this Court, without a single dissenting vote on this point, held that "a state court conclusion that counsel rendered effective asistance is not a finding of fact binding on the federal court" under the statutory presumption; the presumption applies neither to the "performance" nor to the "prejudice" part of the test. Since under *United States v. Bagley*, 105 S. Ct. 3375 (1985), precisely the same legal test on prejudice applies to both ineffectiveness claims and *Brady* violations, the ultimate judgment whether a *Brady* violation "undermined confidence in the outcome" cannot be considered a factual question, subject to the statutory presumption. The very nature of a "materiality" determination — whether, in the light of what might have happened at the trial had the exculpatory evidence been revealed, the verdict would have been the same — shows that a reviewing court is applying judgment, often difficult judgment, to what *should* have happened at the trial rather than what *did* happen. In no sense could that be considered an "historical fact" to which the statutory presumption applies. Furthermore, all the federal courts that have examined this issue

have agreed: materiality is not a factual question, but a legal conclusion not subject to the presumption of correctness. Indeed, as the District Court pointed out, even the state courts in this case have treated it as such (Pet. App. 61a).

The other questions presented are so fact-dependent that they cannot serve as the basis for the grant of a writ here under this Court's rules, as indicated below.

Statement of the Facts

The two victims who survived the shootings and described the assailants, never identified respondents. One of the victims even selected photographs of two other men as the assailants. Even though respondents were brought to the scene by police shortly after the shootings, no witness (including Bello) identified them.[1] All contemporaneous descriptions of the perpetrators and their clothing were consistent and in no way described Carter and Artis. That no one identified respondent Carter is especially significant since he was such a well-known sports figure in his hometown of Paterson and so easily recognizable by his trademark bald head and beard. The police repeatedly stated that the gunmen did not have beards. As the chief investigating officer told the grand jury which exonerated respondents, "the physical description of the two holdup men is not even close [to Carter and Artis]". (Pet.App. 68a)

The State had no case until October 1966, four months after the shootings, when Bello "involved in other criminal charges, provided evidence directly incriminating the defendants." 85 N.J. at 306. This "evidence" was secured by continued police pressure on and inducements to Bello during this period, which undermine the competence and voluntariness of his identification. Bello was aware that if he did not identify Carter and Artis, then the police were interested in him as a suspect involved in this crime (A. 20A4531-32). They kept him in custody (against his will, according to an affidavit) prior to the first trial. He was not

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[1] Originally Bello identified no one to the police and, in fact, had described two men (both thin build, 5'11") who did not resemble respondents. Victim Marins described both gunmen as light-complexioned Negroes, thin build, about six feet tall, and no beards. Carter had a prominent beard, was 5'7", with a very dark complexion and stocky build (Pet. App. 67a-69a).

charged with various crimes he committed, nor was his parole revoked; the prosecutors interceded with judges and arresting officers for him on other criminal charges, and sought to get him a $10,000 reward. (Pet. App. 67a-68a)[2]

Bello testified in 1967 that he was "on the street" walking towards the Lafayette Bar when the shootings occurred, having just completed a burglary nearby; after hearing the shots, he saw two tall, thin "colored" men coming around the corner and walking down the street towards him; he ducked into an alley and saw a car speed away. 85 N.J. at 305.

The Brady Context

The State's case began to unravel in 1974 when both Bradley and Bello independently recanted and swore they did not see and could not identify anyone as the gunmen.[3] 85 N.J. at 306; Pet. App. 26a-27a. Bradley stood by his recantation and never reappeared as a witness. Bello began a convoluted journey before various tribunals prior to the 1976 retrial. He changed his story, under oath, time after time, adding details here, remembering this, not remembering that, "revising his story until it became unrecognizable" (Pet. App. 50a). These new stories, however, had a common nucleus: instead of being "on the street" when the shots rang out, he was "in the bar". In some versions he saw two persons do the killings — not Carter and Artis — but saw the latter outside the bar afterwards (Pet. App. 5a-6a). But the State did not accept the "in the bar" story given by Bello since it flatly contradicted his 1967 "on the street" story and raised serious questions (if "in the bar" when the shootings began, where did he hide,

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[2] Suppression of a taperecording made of the key October police interview showing that Bello's inability to identify respondents and their car was overcome by his susceptibility to police pressure and suggestion was a ground for the unanimous reversal of the 1967 verdicts. See 69 N.J. at 432.

[3] In 1973, Bello had sought help at a clinic for alcoholism. He told his psychiatrist that he was in the bar at the time of the shootings and that two "colored" men — not Carter and Artis — were the gunmen (A. 20A4535-4537; 2F197-198). At the 1976 trial, Bello said he had revealed this account to his psychiatrist to explain why he was drinking so heavily and to facilitate his treatment (A. 23A4977-4978). Contrary to the State's assertions (Pet. App. 60a), Bello's recantation and in-the-bar stories originated with Bello himself.

why wasn't he shot, what was his involvement, what could he have seen, etc.). The State arranged a polygraph, one purpose of which, as the Prosecutor testified, was to settle the question of where Bello was during the shootings (Pet. App. 51a, 125a).

Bello told the polygrapher, Leonard Harrelson, *inter alia*, that he was "in the bar" when the shootings occurred and saw respondents outside afterwards.[4] He concluded that Bello was telling the truth and told the prosecutors that, in his opinion, the "in the bar" story was true. The prosecution vigorously argued with him, rejecting his conclusion and insisting the in-the-bar story was impossible. Harrelson insisted he was correct, that his finding was not tentative or preliminary, and would not change upon further review.[5] (Pet. App. 6a, 51a-52a, 99a, 125a) Harrelson repeated his position in a lengthy conversation with the Prosecutor four days later. Despite the polygrapher's firm conclusion, the prosecutors — recognizing the disastrous consequences of trying the case with a story that would have proven Bello's first trial testimony was a lie — proceeded to keep Bello in custody and indoctrinate him exclusively with his first trial on-the-street story (A. 1C142-43, 159-63). (These and related events were first revealed in 1981 at the remand hearing, and show the prosecution's singleminded determination to get Bello back to the 1967 story regardless of what the polygraph showed.)

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[4] Bello also told Harrelson he did *not* see Carter or Artis in the bar, but he did see another man — one of the gunmen — going around a pole just as he heard the shots (A. 2C437-438), corresponding exactly to where and when victim Marins saw one of the gunmen. Bello also told Harrelson of the presence of two other witnesses at the bar at that time. Unknown to respondents, all of the above were found by Harrelson to be "the truth"; yet at trial Bello specifically denied (a) seeing any gunman in the bar; (b) the presence of these two other witnesses; and (c) being in the bar himself. (The Prosecutor in summation ridiculed the very idea of Bello being in the bar.)

[5] Three prosecutors swore under oath that Harrelson told them his oral reports were only "preliminary", "tentative" and subject to further "review" (85 N.J. at 308; Pet. App. 125a). The State Supreme Court (91 N.J. at 111-112, 134) unanimously found to the contrary:

> . . . Harrelson specifically and adamantly insisted that he never used those or any similar words or ever made the statement to "anyone at all on the face of the earth that [he] was unsure of Bello's test results". (Pet. App. 125a).

Weeks later, Harrelson sent a written report to the prosecution in which he concluded that he believed Bello's 1967 trial testimony was "true". 85 N.J. at 307. He had mistakenly believed that Bello had testified in 1967 that he was "in the bar." Thus his report meant the opposite of what it said since the 1967 trial testimony was an "on the street" story. The prosecution never contacted Harrelson to see why his later written conclusion was directly contrary to his original oral reports. Yet testimony from four former prosecution members and two journalists established firm prosecutorial awareness of the discrepancy between the oral and written reports and the significance of that discrepancy. The original information circulating in the Prosecutor's Office was that Bello had "failed" the lie detector test; then, inexplicably, it changed to Bello had "passed". This switch featured prominently in the decisions of Assistant Prosecutor Richard Thayer and County Investigator Richard Caruso to resign, and prompted Thayer's comment that "The case stunk and ... the behavior of the Prosecutor's Office stunk" (A. 9C2077; 8C2016). Only the mistaken written report was disclosed to the defense, despite specific requests for all polygraph information (Pet. App. 52a).

Compounding the error, the prosecution used that erroneous report to get Bello back to his original story. As Assistant Prosecutor Ronald Marmo unequivocally stated at trial (A. 21B2724-2725):

> Bello was confronted with [the written results], and this is what brought Bello back to the testimony which he gave at the initial trial.

In the prosecutors' own words, which they reiterated at the remand hearing and at oral argument below, they "confronted" Bello with the mistaken "report," told him that the "lie test" showed the on-the-street version must be true and he finally "broke" and returned to that story. (See Pet. App. 17a, citing the state courts; see also 85 N.J. at 315.)

At trial, the prosecutors told the court that if the defense asked Bello why he changed from "in the bar" to "on the street" they would bring out the polygraph results which ostensibly (but not actually) supported his original on-the-street story (Pet. App. 64a). The court ruled that if the defense questioned Bello about the circumstances of his latest return to his on-the-street version, that

would open the door to the lie detector results allegedly supporting that Bello version (his 1976 trial testimony), and to Harrelson's supporting testimony. As a result, the defense, unaware of the oral reports and of the misuse of the written report, had to avoid cross-examining Bello and police witnesses regarding the prosecution's effort to again change his story to suit their trial purposes (85 N.J. at 310 n.3). And the prosecution succeeded in restricting cross examination and in aborting a crucial defense argument in summation (A. 45A10674-75; Pet.App. 62a): Bello's 1976 "on-the-street" trial story was produced by the same prosecution pressure that had improperly prevailed in 1967.

A Verdict of Already Questionable Validity

Petitioners' protestations notwithstanding, the *Brady* violation relating to the only "eyewitness" was all the more significant in view of the thinness and tenuousness of the State's case. Their characterization of the trial evidence is, at the very least, misleading. They ignore the compelling proofs of respondents' innocence and make a series of conclusory statements about the evidence with absolutely no basis in the record. They claim, for example, that there was testimony "from eyewitnesses to the effect that the Carter vehicle, as well as Carter and Artis, were at and fled the scene." (Pet. 5). But the only alleged eyewitness identifying respondents at the scene was the notoriously unreliable Bello, and no witness identified the car. They totally misstate the nature of the motive "evidence" — never mentioning the question of race, yet their bizarre and ugly "racial revenge" argument was the entire basis of their "motive" argument at trial.

But argument is no substitute for the facts. According to the District Court, "Even at its strongest links, the government's chain of evidence [was] substantially called into question by [respondents]". (Pet. App. 74a) State's witnesses themselves gave one account on direct examination and a different one on cross; their testimony was unsubstantiated and contradicted by police reports and prior testimony, and had "improved" to the State's benefit from 1967 to 1976; vital documents were missing; documents supposedly "destroyed" ten years earlier suddenly reappeared; the surviving victims failed to identify respondents; and

all original descriptions (including Bello's) were "not even close" to Carter and Artis. Every element of the State's case was contradicted and disputed.

The original police reports from witnesses on the scene consistently decribed the perpetrators as two, thin-built, light-skinned Negroes, about the same height, (5'11"), no beards, one with a thin mustache, both wearing dark clothes (A. 17A3850, 29A6377, 30A6471, 31A6896). The description is not remotely close to the respondents, who were wearing light clothes, have a six-inch height difference, with Carter thick-set, 5'7", gleaming bald head, prominent goatee and very dark-skinned. Neither of the survivors identified respondents as the perpetrators, although both viewed them within hours of the shootings (Pet. App. 26a).

Petitioners' conclusory statement (Pet. 5, 6, 22) that the Carter car was described and identified at the scene as the getaway car, is a gross mischaracterization of the evidence, unsubstantiated by any police report or memorandum, and simply ignores the mass of trial testimony, even from the State's own witnesses, which acknowledged that no such event occurred; see District Court opinion (Pet. App. 66a-67a, 70a). Petitioners misstate Mrs. Valentine's testimony, which revealed the following: (1) Valentine did *not* identify the Carter car to the police at the scene and admitted on cross, that her 1967 testimony as to that *non*-identification was true: she was "not specifically identifying" the Carter car as the getaway car (A. 16A3507-3509); (2) she described a different model of car than the Carter car (there was also testimony that the Carter car was a different color); and (3) Valentine never identified respondents as the men she saw fleeing the scene.

It is also clear that no ballistics linked respondents to the crime. Contrary to petitioners' misleading statements (Pet. 5), the one shell and one bullet the police claimed they found in the Carter car were not "consistent with" or "of the same type" as the ammunition used at the scene, but had numerous and significant differences (Pet. App. 70a-71a). The shotgun shell was not allowed into evidence at the first trial because the trial court found it to be too remote in description to have probative value. This shell was, however, identical in every respect to a shell recovered by police from an earlier murder scene and which had disappeared

from that evidence. Moreover, the official complaint report, signed by the officer who allegedly found the bullet and shell in the Carter car, made no mention of such a discovery, which was negated also by fatal irregularities in the logging and tagging of the evidence. No weapons were ever recovered; no fingerprinting was allegedly done on any evidence; nor were respondents given paraffin tests.

The state's case had other major flaws.[6] There were bona fide alibi witnesses who were socializing with respondents on the night of the shootings. Their testimony made it impossible for respondents to have been at the scene when the crime occurred (Pet. App. 72a-73a) and, as the chief investigator told the grand jury, to have made the necessary clothing change (A. 29A6377). All the evidence showed that respondents' behavior, movements, and demeanor on the night of the Lafayette shootings were entirely normal and social and consistent with their innocence, and so utterly at odds with the frenzied deviousness demanded by the State's speculation of an elaborate and sinister conspiracy, as to be absurd.

For example, the prosecution had to explain why there was a third person (Royster) in the Carter car when it was stopped by the police shortly after the shootings and why there were only two men in the Carter car when it was stopped by the police twenty minutes later. Despite the absence of a single supporting witness, despite the testimony of Royster and others to the contrary, and despite the fact that all witnesses saw the getaway car fleeing in the opposite direction, the Prosecutor told the jury that Carter and Artis raced to a local bar, where they picked up Royster for alibi purposes and then drove casually around in the area. The proposition that the two perpetrators, fully aware they and their "distinctive" car had been witnessed at the scene, would then take

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[6] See also Pet. App. 66a-74a for a review of the totality of the circumstances. For example, the State's allegation that respondents' attorneys at the first trial (one of whom is now a State Superior Court judge) solicited a "false alibi" on behalf of Carter in 1967 is insupportable in the face of the record reviewed in some detail by the District Court (Pet. App. 71a-73a). Petitioners' claim that respondents gave "inconsistent" oral statements to the police is also vigorously disputed in the record (see Pet. App. 71a) and, in any event, was so inconsequential, it was not even argued to the jury. Petitioners' untenable claim of fabricated testimony on the part of Artis was likewise never argued to the jury (nor to the District Court).

pains to pick up a third man "as a decoy" and yet continue to drive around in the same car in the same vicinity and minutes later *drop him off*, the two perpetrators remaining in the same car and continuing to drive around, now closer to the crime scene, is preposterous, as even the police acknowledged to the original grand jury (A. 45A10658).

The prosecution's predilection for forcing the square pegs of its theory into the round holes of the facts is particularly evident in its racial revenge speculation. See Pet. App. 31a-50a. At the second trial (no motive evidence was offered at the first trial), the Prosecutor stated in open court:

> . . . the State contends the motive for [the] killings was that it was a *racial* killing in revenge for a killing committed earlier that same day. . . . It's a case that involves black people killing white people and the basis for that killing . . . is because of . . . *racial* revenge. (A. 6A1080-1082; emphasis added)

The District Court found the State's reference to and reliance upon this motive theory was a Due Process violation since it appealed to racial prejudice.[7] The Court analyzed the State's theory "in its most favorable light", "accepting [each element] as true and proven" and found it even on *that* basis constitutionally defective: "a thin thread . . . of largely irrelevant evidence and impermissible inferences" (Pet. App. 38a), based on respondents' race and unrelated to them as individuals; and none of this "irrelevant evidence" was "true and proven" in any event.[8]

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[7] Petitioners' claim (Pet. 9) that the State Supreme Court had rejected this argument ignores the fact that the three dissenters joined in *no* part of the majority opinion.

[8] The Court found that respondents had nothing but good and "cordial relationships with white people, socially and professionally" (Pet. App. 40a) and there was no evidence of any racial animosity toward whites in general, or the victims in particular. In addition, in order to sustain its theory, the alleged target/victim had to be prejudiced, but the evidence showed the contrary (Pet. App. 39a). The State had to eliminate robbery as the motive; yet there was evidence that pointed to an aborted robbery attempt (Pet. App. 37a, 39a n.5). Other areas of the State's theory also do not withstand scrutiny. The so-called "search for guns" (Pet. App. 40a-42a) was

(Footnote Continued)

The District Court considered it highly significant that respondents were released on the day of the Lafayette shooting without any charges, despite an alleged wealth of evidence against them that the State claims it had already amassed and, significant too, that the grand jury twelve days later exonerated respondents. This fatal flaw at the root of the State's case is detailed in the District Court opinion, Pet. App. 73a-74a.

Proceedings Below

Petitioners' implication (Pet. 9) that respondents slept on their rights and somehow delayed presenting their claims to the federal courts is baseless. *There never was a time in which the respondents were not in court seeking to overturn their convictions.* The case was vigorously pursued in state courts for six years (from 1976 to 1982), with argument before the appellate division, two arguments in the New Jersey Supreme Court, and a remand hearing lasting three weeks.[9] When new exculpatory evidence was found during the remand hearing (consisting of the file of County Investigator Richard Caruso, who had questioned many of the tactics and actions of the prosecution, had found considerable suppressed exculpatory information, and resigned due to dissatisfaction with the office)[10] respondents pursued still further state court appeals to develop that material. When they filed their federal

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nothing but a prosecutorial invention and distortion of innocuous record facts of a chance encounter between Carter and a former sparring partner who Carter had heard had stolen and sold, a year earlier, some hunting and target weapons from their training camp. This "search"—integral to and argued as a "proof" of the racial revenge motive speculation—was absolutely unrelated to the motive, as the events which the prosecution fashioned into a "search", began before the motive could have been formed in either respondent's mind.

[9] There were also hearings relating to testimony that some jurors during *voir dire* had concealed their prejudices against blacks and that others had been tainted by false considerations outside the evidence. This jury misconduct is another ground in the petitions for writs of habeas corpus, not ruled upon by the District Court.

[10] For example, the investigator's notes stated the following (A. 3F347):

> I demanded to be removed or expose. They said O.K. But I would never be allowed to reveal/testify as I was privy to Pros. case.

The notes cast further doubt on the already unreliable testimony given by Mrs. Valentine. The courts below did not cite or rely on material from the Caruso file.

habeas corpus petitions in 1985, the State argued that they had still not exhausted all their state court remedies on the Caruso issue and were premature in filing federal writs, which totally undermines the implication that respondents slept on their rights (Pet. 24-25). The prosecutors finally conceded exhaustion had occurred and stated they were prepared to argue the merits of respondents' summary judgment motion, which they proceeded to do.

Petitioners nowhere mention either the nature or number of the many other grounds asserted in respondents' habeas petitions – many involving further instances of suppression of exculpatory material and prosecutorial misconduct. As to Carter, nine grounds are still undecided, and as to Artis, thirteen. (These constitutional violations are described by the District Court at Pet. App. 29a-30a.)

Furthermore, petitioners nowhere describe the District Court holding that the racial revenge theory was an appeal to racism that also justified grant of the writ. According to the District Court (Pet. App. 43a, 48a):

> The inferential leaps made by the prosecutor are virtually impossible without the unstated appeal to the jury that it is perfectly reasonable to expect blacks to commit murder when one of their own is attacked. The fallacious premise of the argument becomes self evident if it is reversed and applied toward whites. Would a jury be permitted to conclude that a white defendant would have expressed such violent and indiscriminate rage without any evidence of personal racial animosity?
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> In sum, the prosecutor's theory invokes race for a purpose that has very slight or uncertain logical validity, and does so at a distinct risk of stirring racially prejudiced attitudes. *McFarland v. Smith*, 611 F.2d at 419.

The Third Circuit found it unnecessary to reach that question in the light of the *Brady* violation.

Opinion of the Third Circuit

The Third Circuit unanimously found that a classic *Brady* violation had occurred. First it cited this Court's decisions in *Bagley*

and *Giglio v. United States*, 405 U.S. 154 (1972), that evidence that would impeach a key witness is evidence favorable to the accused (Pet. App. 11a). Second, it concluded, as did all the reviewing courts, that the Harrelson lie detector results on Bello were favorable to, and should have been disclosed to, the defense. Third, it examined the question of whether materiality determinations made by a state court are subject to the presumption of correctness under 28 U.S.C. § 2254(d). Noting that no Court of Appeals' case held to the contrary and that all have concluded that materiality issues are mixed questions not subject to the presumption (Pet. App. 4a), the Court concluded likewise.

Since it was not bound by the presumption, the Court of Appeals considered anew whether the defense could have made effective use of the undisclosed Harrelson oral reports. Accepting the finding of all the state courts that the lie detector results were "importan[t]...in shaping Bello's testimony" (Pet. App. 17a), the Court concluded that the reports had to be material:

> Reduced to its essence, the issue comes to this: had the prosecution properly disclosed Harrelson's oral reports Carter would have been in a position to argue that the prosecution had persuaded Bello to return to the "on-the-street" version not because it was true, but because that is what the "lie detector" results demanded. This is more than mine-run cumulative evidence. (Pet. App. 18a)

Most significantly, the results could also have been used to undermine Bello's identification of the respondents, since the evidence directly affected his vantage point at the time of the shootings and thus "goes to the very heart of [his] testimony." The inconsistency as to where he was, was not cumulative and immaterial, since it affected "his opportunity and ability to identify Carter and Artis." (Pet. App. 18a-19a)

Since Bello was the only "eyewitness", his testimony was crucial: "under any reasonable characterization of the 1976 trial, the critical importance of Bello's testimony looms large and commanding." (Pet. App. 20a) Thus, since his testimony was critical and his credibility was a crucial issue, there is a reasonable probability that the result of the trial would have been different had the prosecution properly disclosed Harrelson's oral reports. The Court concluded that the writ was properly granted.

SUMMARY OF ARGUMENT

A finding by a state court that a *Brady* violation was not material cannot be a "factual" finding subject to the presumption of correctness under 28 U.S.C. § 2254(d). First such a determination is a difficult judgment call as to what *would* have happened at the trial if certain evidence had been disclosed, not what did happen at the trial. Under *Bagley*, that determination must involve the application of legal judgment to a factual situation and therefore materiality conclusions must be considered mixed questions. Second, the type of judgment as to prejudice under *Brady* and *Bagley* involves precisely the same question of prejudice as is presented when ineffectiveness questions are examined under the *Strickland* standard. Since this Court ruled in *Strickland* that determinations as to the prejudice of ineffectiveness are mixed questions not subject to the presumption, the same conclusion must follow as to materiality determinations made under *Bagley*. Third, examining whether a *Brady* violation was material involves the application of legal principles to the facts of a case, a task which this Court has always concluded involves a mixed question of law and fact; see *Sumner v. Mata ("Sumner II")*, 455 U.S. 591, 597 (1982). Fourth, weighing the effect of an error upon the trial is precisely what the harmless error doctrine requires, yet this Court has always held that harmless error determinations are mixed questions not subject to the presumption; see *Rushen v. Spain*, 464 U.S. 118, 120 (1983). Finally, in the *Brady* area, the issue of materiality is tied into the very question of whether a constitutional violation has occurred. Under no circumstances can that question be labelled a factual question since it would deprive the federal courts of their ultimate responsibility of defining and applying constitutional principles; see *Sumner II*, at 597.

If the presumption is not applied, then clearly the court below was correct in finding the violation was material. Certiorari should not be granted to apply the correct legal standard to the facts of this complicated, 92 volume, 20,000 page record. Bello was the key witness in this case, the only eyewitness identifying either respondent. The polygrapher's oral reports would have totally undermined his testimony since the erroneous lie detector results were the instruments used to have him change his testimony. The undisclosed information was critical in exposing the method by

which Bello's trial testimony was secured. The oral reports were also crucial in undermining his identification of respondents since that related to his vantage point ("in the bar" vs. "on the street").

The notice of appeal issue relating to John Artis is already before the Court in another case and becomes a superfluous issue if certiorari is denied on the merits under questions 1 and 2.

REASONS FOR DENYING THE WRIT

I. A State Court Finding that a *Brady* Violation is Not "Material" is Not a Factual Finding Subject to a Presumption of Correctness under 28 U.S.C. § 2254(d).

Petitioners' main contention here is that the presumption of correctness in the habeas corpus statute should apply to a state court finding that a *Brady* violation was not material, and that the Third Circuit was in error in deciding to the contrary. This Court has examined the question of what determinations by the state courts are subject to the presumption of correctness in no less than eleven cases in the past seven years: *Cuyler v. Sullivan*, 446 U.S. 335 (1980)(whether lawyer engaged in multiple representation is mixed question not subject to presumption); *Sumner v. Mata*, 449 U.S. 1981)(suggestive pretrial identification may be mixed question): *Sumner v. Mata*, 455 U.S. 591 (1982)(suggestive identification is mixed question but underlying factual questions entitled to presumption); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (questions underlying voluntariness of guilty plea entitled to presumption); *Maggio v. Fulford*, 462 U.S. 111 (1983)(competence to stand trial is factual issue, subject to presumption); *Rushen v. Spain*, 464 U.S. 114 (1983) (whether jurors deliberations were biased is question of fact); *Patton v. Yount*, 467 U.S. 1025 (1984) (individual juror's bias is factual question); *Strickland v. Washington*, 466 U.S. 668 (1984) (effectiveness of counsel is mixed question, not subject to presumption); *Wainwright v. Witt*, 469 U.S. 412 (1985) (jury bias is question of fact); *Miller v. Fenton*, 106 S. Ct. 445 (1985) (voluntariness of confession is question of law); *Vasquez v. Hillery*, 106 S. Ct. 617 (1986)(absence of blacks on grand juries was factual question entitled to presumption).

These decisions have laid out the basic principles which apply in this area: questions of primary, historical fact are subject to the presumption as well as issues dealing with the credibility of

witnesses, *Cuyler, supra*, 446 U.S. at 342. At the other extreme, the application of legal principles to the facts and the actual determination of whether a constitutional violation occurred involve legal conclusions or mixed questions and are therefore not subject to the presumption. *Sumner, supra*, 455 U.S. at 597. The question of materiality under *Brady*, involving as it does the application and definition of a constitutional standard, falls so clearly on the "mixed question" side of the line as determined by this Court, that there is no basis for the grant of certiorari to consider that question.

In the first place there is absolutely no conflict in the Circuits on this issue. Petitioners fail to point out that every Circuit that has considered the matter has concluded that materiality is a mixed question of law and fact and not subject to the presumption, as the Court of Appeals noted below (Pet. App. 14a). See *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 458 (1986); *Chaney v. Brown*, 730 F.2d 1334, 1345-46 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 601 (1984); *Ruiz v. Cady*, 635 F.2d 584, 588-89 (7th Cir. 1980); *Davis v. Heyd*, 479 F.2d 446, 451 (5th Cir. 1973). See also *Chaney v. Lewis*, 801 F.2d 1191, 1193, 1195 (9th Cir.1986) (Kennedy, J. on panel) (State's failure to preserve exculpatory evidence was mixed question of fact and law).

Indeed there is not a single vote in a reported federal case to the contrary—unlike the situations in *Miller v. Fenton*, 106 S.Ct. 445, 449 (1985) and *Wainwright v. Witt*, 469 U.S. 412, 417 (1984), where the conflicting holdings among the various circuit courts figured specifically in this Court's reasons for granting certiorari.[11]

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[11] Petitioners' reference to a contrary single dissenting vote in *Davis v. Heyd*, 479 F.2d 446, 454 (5th Cir. 1973) (Coleman, J., dissenting) and the district court decision in *Mixon v. Attorney General*, 583 F.Supp. 190 (D.S.C. 1982) is simply wrong. Aside from the fact that conflicts created by dissenting votes or district court decisions are not a basis for the grant of certiorari under this Court's rules (Sup. Ct. Rule 17), the dissenting vote in *Davis* focused on whether a state court finding that two statements made by a witness were inconsistent with each other, not whether materiality determinations generally are fact questions subject to the presumption. In *Mixon*, the district court applied the presumption only to the facts underlying the *Brady* issue and concluded on its own that the new evidence "would not have affected the result." 535 F.Supp. at 195. The case does not stand for the proposition offered by petitioners.

This unanimity is understandable. The question of whether a *Brady* violation is material requires the exercise of careful judgment by a reviewing court as to what use the defense could have made of the withheld evidence had they known about it at trial. As this Court said in *Bagley* (105 S. Ct. at 3384):

> The reviewing court should assess the possibility that such [adverse] effect [on the outcome] might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been mislead by the prosecutor's incomplete response. (plurality opinion of Justice Blackmun)

But stating that a reviewing court must attempt to reconstruct how the trial would or might have gone — and recognizing how difficult a task this is — is simply another way of saying that the reviewing court must use *judgment* on what *might* have happened or *would* have happened. It is not reconstructing what *did* happen at the trial. The problem of materiality, in that light, is clearly a question of the application of the law to the facts, that is, a mixed question of law and fact, to which the presumption does not apply.

Appellate courts and federal courts on habeas corpus may defer, as they always do, to the conclusions of trial courts closer to the actual events. State court judgments on the law are never ignored by federal courts and they were certainly given great weight here. (See, *e.g.*, Pet. App. 15a-21a, 23a-24a, 61a-65a.) But the application of the statutory presumption is much stronger medicine since it precludes any contrary conclusion by the federal courts, except under circumstances specified in Section 2254(d). (It must be noted that respondents do indeed argue—and argued below—that two of the exceptions, (d)(6) and (d)(8), apply. See last paragraph of this Point.)

Furthermore, this Court in *Strickland v. Washington*, *supra*, held that the statutory presumption does not apply to ineffectiveness of counsel claims, including both the "performance and prejudice components," 466 U.S. at 698. "Ineffectiveness is not a question of 'basic, primary or historical fac[t],' " quoting from *Townsend v. Sain*, 372 U.S. 293, 309, n.6 (1963). To determine

whether a counsel's performance prejudiced the defendant, reviewing courts must apply the following legal test, which this Court has specified is the "governing legal standard":

> ...the appropriate test for prejudice finds its roots in the test for materialty of exculpatory information not disclosed to the defense by the prosecution...The defendant must show that there is a reasonable probablity that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694, 695. In *Bagley* this Court applied the same test of prejudice to materiality determinations after the failure to disclose exculpatory evidence (105 S. Ct. at 3384):

> We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

It follows that since the same "legal standard" is applied in both ineffectiveness and *Brady* cases, and the same judgment by a reviewing court must be applied to both — were the deficiences sufficient to undermine confidence in the outcome — then materiality-prejudice is, by this Court's definition, the same as ineffectiveness-prejudice. They are both judgment calls by a reviewing court as to what might have happened rather than what did happen. As such they are both not historical facts, but mixed questions of fact and law, not subject to the statutory presumption.

Viewed another way, determination of whether a *Brady* violation was material involves the application of the legal standard (*i.e.*, "undermines confidence in the outcome") to the particular facts of the case. See concurring opinion of Justice White in *Bagley*, 105 S.Ct. at 3385. Such a function clearly involves the use of legal

and constitutional judgment, as this Court emphasized in *Sumner v. Mata* [II], 455 U.S. 591, 597 (1982):

> the ultimate question as to the constitutionality of the pretrial identification procedures. . . . is a mixed question of law and fact. . . . In deciding this question, the federal court may give different weight to the facts as found by the state court and *may reach a different conclusion in light of the legal standard.* (emphasis added)

The "ultimate question as to the constitutionality" of the prosecutor's action in not revealing exculpatory evidence is precisely what a materiality determination is. Federal courts may – indeed are obligated to – examine this issue on their own and may "reach a different conclusion" than the state court.

The same conclusion follows from this Court's analysis in *Miller v. Fenton*, 474 U.S. 104 (1985). This Court suggested that one way of distinguishing questions of fact from questions of law is through the process of allocation. That is, which judicial actor is "better positioned to decide the issue in question." When historical facts or the credibility of witnesses are at issue, the trial court is certainly better positioned.[12] But when the question is what could or might have happened if certain evidence had been produced, the trial judge is not in a unique position to decide the issue, any more than he is better qualified to decide what would or might have happened if the defendant's lawyer had taken certain actions. The judge's role in both situations is exactly the same: he is weighing events that did not happen and trying to make difficult judgments as to what would have happened. There is simply no principled way to distinguish ineffectiveness-prejudice issues from materiality-prejudice issues, as this Court has emphasized by constantly equating the two situations. If one is a legal question (or a mixed question) then the other is as well.

This result is also required by this Court's "harmless error" cases. In some situations, a court must, after determining whether a constitutional violation occurred, apply a second-tier analysis – it must then determine whether there must be automatic reversal

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[12] Thus, petitioners' reliance on the passage they quote from *Miller* (Pet. 16) is misplaced, as there is no dispute here that a trial court is "better positioned" to determine historical facts or the credibility of witnesses.

or whether the error was harmless. See *Rose v. Clark*, 106 S. Ct. 3101 (1986). It has been the well-established rule that "harmless error" determinations involve mixed questions of law and fact, not subject to the presumption. See *Rushen v. Spain*, 464 U.S. 118, 120 (1983): "The final decision whether the alleged constitutional error was harmless is one of federal law." If the decision is one of federal law, it must surely be one of law and not one of fact. See also *Lacy v. Gardino*, 791 F. 2d 980, 986 (1st Cir. 1986) (state finding of harmless error not entitled to presumption of correctness); *McKenzie v. Risley*, 801 F.2d 1519, 1523 (9th Cir. 1986) (harmless error determination not subject to presumption).

That is true despite the fact that the trial judge may have heard the evidence and determined the credibility of witnesses and may have some notion of how the error affected the proceedings. Nevertheless, weighing the *effect* of the error in light of the entire proceedings and determining whether the evidence was "overwhelming" and therefore whether the error was "harmless" has never been considered the special function of the trial judge binding on reviewing courts and therefore the type of decision that is subject to the presumption of correctness. Since the type of evaluation and judgment made by the courts on a *Brady* evaluation, *i.e.*, what was the effect of withholding the exculpatory evidence upon the entire trial, is precisely the same type of judgment made in harmless error situations, the unequivocal holding of this Court in *Rushen* that harmless error determinations involve legal evaluations must carry over to materiality evaluations in the *Brady* context as well. It is exactly the same type of question. Indeed, in *Bagley*, the standard for materiality of *Brady* information establishing the knowing use of perjured testimony is precisely the harmless error test, 105 S.Ct. at 3382, n.9 . If one standard for materiality under *Brady* is a legal standard, then obviously the other standard (reasonable probability) must be one as well.

In other situations, the effect of the error is inextricably tied into the question of whether constitutional error occurred at all. There, the courts do not engage in a two step analysis, but only a single level of inquiry: was the error so serious that the trial became fundamentally unfair. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974)(prosecutor's remark was not so serious as to make trial "so fundamentally unfair as to deny him due process");

see also *Darden v. Wainwright*, 106 S. Ct. 2464 (1986)(prosecutorial remarks); *Holbrook v. Flynn*, 106 S. Ct. 1340 (1986)(use of armed guards in court). In this group of cases, just as in the ineffectiveness and *Brady* cases, the errors do not reach constitutional dimensions unless and until a prejudicial point is reached. Put another way, the definition of the constitutional error involves an evaluation of the prejudice component: unless it was seriously prejudicial, there is no constitutional error.

It follows that the determination of whether there was prejudice clearly must involve a legal evaluation. If the federal courts were precluded from questioning the prejudice or materiality component of the error (which are identical in this context) because they are considered "factual," then the federal courts would be barred from their most important function, actually defining what constitutes a constitutional violation. Since under *Sumner v. Mata*, 455 U.S. 591, 597 (1982) "the ultimate question as to ...constitutionality ...is a mixed question", a *Brady* materiality determination must be such a question, as weighing and determining that issue is the "ultimate [constitutional] question."

Thus weighing the effect of an error (by counsel who may be ineffective, or by the withholding of exculpatory evidence) is so much a matter of the application of judgment, and in particular of constitutional judgment, that the presumption cannot possibly be applied. Nor did Congress intend to give that kind of deference to state court determinations in this area since it would amount to a fundamental ousting of the historic responsibility of the federal courts to define the scope of constitutional error.

It must also be noted that respondents have always urged that the presumption should not be invoked since the Section 2254(d)(6) and (8) exceptions apply here. Thus respondents asserted, and submitted considerable evidence to show, that they did not receive a fair and adequate hearing in state court and that factual determinations were not fairly supported by the record (Pet. App. 59a, 64a). The courts below did not consider whether either exception should apply. Even if this Court reversed the Court of Appeals on the issue of whether materiality determinations are subject to the presumption, it should still not be invoked until the application of the exceptions is determined by the lower courts.

II. The Third Circuit Finding of Materiality Is Amply Supported in the Record

Petitioners are asking this Court to re-evaluate the 20,000 page record of this case, alleging that the Circuit and the District Court's evaluation of the record was so "inadequate" as to merit this Court's intervention (Pet. 19, 23). That is not a basis for the grant of certiorari. As members of this Court have emphasized numerous times, "when no new principle of law is presented, we should generally leave undisturbed the decision of a court of appeals that upon a particular set of facts of any case habeas corpus relief should be granted," *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (Justices Stewart and White, concurring). See also *United States v. Hasting*, 461 U.S. 499, 516-17 (1983) ("This Court is far too busy to be spending countless hours reviewing trial transcripts to determine the likelihood that an error may have affected a jury's deliberations.") (Stevens, J., concurring)

Furthermore, this Court should not grant certiorari, as the facts of this case are simply so idiosyncratic that it is highly unlikely that any comparable situation can arise. How often will the only eyewitness to a homicide change his testimony because he is "mistakenly" told that his lie detector results required a change in his testimony?

There is no doubt that the undisclosed evidence was crucial impeachment material under well-established precedents in this Court. See *e.g.*, *United States v. Bagley*, 105 S.Ct. 3375, 3380 (1985): "Impeachment evidence, however, as well as exculpatory evidence falls within the *Brady* rule."

In *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985), a writ was granted on *Brady* grounds when impeachment material (a prior statement that the witness did not see the perpetrator's face) had been withheld from the defense. Even though the eyewitness testimony of the other identifier was not undermined, the writ was granted:

> ...our experience at the bar has been that positive identification by two unshaken witnesses possesses many times the power of such an identification by one only, and that the destruction by cross-examination of the credibility of one of its two crucial witnesses—even if the other remains untouched—may have consequences for the case extending far beyond the discrediting of his own testimony.

But in this case, Bello was the *only* eyewitness, and the impeachment material was far more explosive: evidence that erroneous lie detector tests were fed to Bello convincing him to change his testimony in a way favorable to the state.

See also *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986) (evidence undermining eyewitness testimony was material and required grant of habeas writ); *Bagley v.Lumpken*, 798 F.2d 1297 (9th Cir. 1986) (evidence impeaching key government witness was material); *United States v. Severdija*, 790 F.2d 1556 (11th Cir. 1986) (exculpatory statement not disclosed: Brady violation found); *United States v. Srulowitz*, 785 F.2d 382 (2d Cir. 1986) (insurance file which could have contradicted government witness was material: Brady violation found).

Petitioners' argument — that the undisclosed information was not material to guilt or innocence — is contrary to the record, and is eloquently and definitively laid to rest by the State Supreme Court Dissent (Pet. App. 124a-132a), the District Court (Pet. App. 50a-74a), and the Court of Appeals (Pet. App. 3a-21a) — all of which expressed grave doubts as to the propriety of the verdict in light of the undisclosed evidence.[13]

A. Bello's Testimony Was Critical

Petitioners' claim (Pet. 19) that Bello's testimony was inconsequential to the verdict is stupefying. Contrary to petitioners' assertions, the Court of Appeals did not conclude *ex nihilo* that Bello's testimony was of critical importance. The New Jersey Supreme Court unanimously declared Bello's testimony was "prominent" and "critical" to the State's case. *State v. Carter*, 85 N.J. 300, 305. More than one third of the State's summation related to his testimony. Bello was the only "eyewitness" who claimed respondents were at or near the scene. Without his testimony, the victims' non-identification of respondents and the inapposite descriptions of assailants would have been insurmountable. As outlined in the *Statement of Facts* above and in the District Court opinion (Pet. App. 65a-74a), the State's case was weak and thoroughly contradicted.

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[13] Petitioners omit altogether any mention of the blistering dissent by three justices on the New Jersey Supreme Court, and give the false impression that (a) there was unanimity among the state courts and (b) that the federal courts are somehow improperly meddling with an uncontroversial state judgment.

Bello's all-important credibility depended on the prosecution explaining to the jury why in the 1974-1976 period, he had told – under oath – so many different versions of where he was and who and what he saw. Its argument was that Bello was manipulated by various journalists, promoters and lawyers to tell his "in the bar" story, but that he finally decided that he had to tell the truth. Therefore he returned to the "on the street" story which he had told at the first trial.

Respondents, however, tried to show at trial that Bello was such a malleable witness and was subject to such a variety of pressures by the prosecutors that the reason for his return to the "on the street" story had nothing to do with the truth; rather his final switch was totally the result of the prosecutors' actions. What respondents did not know at trial was that there existed in the prosecutor's possession the most devastating evidence to support that theory – namely that the reason Bello changed his testimony for the final time to "on the street" was that the prosecutors confronted him with an erroneous "lie test" that said one thing but meant another, and using that error, caused him to return to the story they wanted.

B. Material Uses of the Undisclosed Polygraph Information

As the Court of Appeals pointed out, the state courts "made ample findings of fact . . . that conclusively demonstrated the importance of the polygraph results in shaping Bello's testimony at the 1976 trial." (Pet. App. 17a) Indeed, every New Jersey court accepted as a fact that the lie detector test was instrumental in that regard. Had respondents known the true state of affairs, they would have been able to make devastating use of the material. As the District Court (Pet. App. 62a-63a) explained:

> If counsel for [respondents] had the relevant information, they would have had the means to convince the jury that Bello selected one of several versions, possibly all untrue, merely because he mistakenly believed it had been confirmed by a polygraph test.

Thus:

> ... they could have argued not only that the choice [of which story to tell] was predicated upon facts submitted by the prosecution, but that those facts were false. The jury could well have concluded then that if Bello had been

> told that the "in-the-bar" version or some other version was found true by the polygrapher, he would have told that version. From those circumstances the jury could have concluded that Bello's choice of the final version was not a decision based on truth but rather one influenced by a premise, and a false one at that, furnished by the prosecution.

Respondents could also have used this information for the following purposes ignored by petitioners: (1) Two prosecution members, who were witnesses themselves, could have been cross-examined about their use of the written report to persuade Bello to change his mind (Pet. App. 62a). (2) "The defense could have attacked the credibility of these two witnesses for concealing the polygraphist's conclusion that Bello was in the bar" (*id.*). (3) A full hearing could have been held during trial to show how Bello was confronted with an erroneous result. His entire testimony may well have been stricken (Pet. App. 17a). (4) The main prosecution theme—that Bello was manipulated away from "on the street" by people allegedly associated with the defense—would have been undermined (Pet. App. 60a).

In short, disclosure of the use of the erroneous polygraph test results would not only have given the defense an opportunity to challenge Bello's credibility, it also resolved the key question of the reason for the final switch from "in the bar' to "on the street": it exposed the related prosecutorial misconduct and undermined the prosecution attack on defense witnesses. When Assistant Prosecutor Marmo asked Bello why he changed from an "in the bar" story in the summer of 1976 to "on the street" at trial in October 1976, he answered, "Because it was true". It was crucial to the defense to counter this by showing that the final switch was made because of the prosecution's use of an erroneous polygraph report which the prosecution knew said the opposite of what the polygrapher had really found.[14] See District Court discussion, Pet. App. 63a.

Moreover, as the New Jersey Supreme Court Dissent, the District Court and the Court of Appeals all pointedly remarked, the

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[14] As to the use of the erroneous report, the prosecutors' own statements are unequivocal (see Statement of Facts, *supra*). Since respondents' *Brady* point depends only on the fact that the lie detector test was used in the manner described and was the "proximate cause" of Bello's change in testimony, and not whether the prosecutors' actions could be characterized as coercive or deceitful, the state court findings on lack of coercion and "intentional" misrepresentation (Pet. App. 99a) are irrelevant, as the Court of Appeals correctly noted (Pet. App. 16a-18a).

discrepancy of where Bello was and what he was doing before, during and just after the shootings "goes to the very heart of his testimony". (Pet. App. 18a) In upholding the admissibility of Bello's trial identification, the New Jersey Supreme Court majority seemingly agreed:

> Even if bringing the car to the scene was suggestive, the totality of the circumstances indicates that the identification was reliable. *Bello had time to view the killers as they walked toward him on a well-lit street. It is likely that he was attentive* since he thought the two were detectives and he himself was involved in a crime being committed down the block.

(Pet. App. 120a; emphasis added) But in his Harrelson version, Bello was in the bar, which is contrary to the trial story described above and goes directly to the unreliability of the identification. The Dissent pointed out the obvious: where Bello was

> goes to the opportunity and ability Bello had to identify defendants. Chances are that what one sees from a vantage point within a tavern as all hell breaks loose is not going to be the same as what one sees as one strolls up the sidewalk after the carnage. The defense attacks on Bello's "on-the-street" story would have proceeded from a wholly different perspective and in an entirely different framework.[15] (Pet. App. 131a)

The *Wade/Stovall* eyewitness identification hearing likewise would have "proceeded from a wholly different perspective", since Bello's capacity to view the perpetrators was so different (Pet. App. 62a).[16]

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[15] See, e.g., *United States v. Downing*, 753 F.2d 1224, 1230-1232 (3rd Cir. 1985), listing factors affecting reliability of eyewitness identifications – all of which apply adversely to Bello; *inter alia*, the negative effect of stress on the accuracy of identifications.

[16] Respondents also could have demolished the particulars of Bello's trial identification of respondents, since he told Harrelson that he "did not know" who the two black men were, but came to believe they were Carter and Artis because he "was told later" the two men brought to the scene by police "were Carter and Artis" (A. 4E616-618). This flatly contradicts Bello's trial testimony in which he claimed to recognize Carter immediately, having seen him twice previously. Indeed, the trial court ruled that Bello's alleged prior knowledge of Carter was "crucial" and "pivotal" in admitting Bello's identification in 1976 (A. 19A4168, 4181). Had the court known Bello told the polygrapher he did not recognize Carter, it is inconceivable Bello's identification would have been admitted.

The Harrelson episode thus could have been used to totally demolish the alleged identification.

In view of the above, it cannot be seriously argued that the undisclosed *Brady* information was merely "of only a cumulative impeaching nature". (Pet. 19)

C. *Petitioners' Meritless Arguments Regarding The Polygrapher's Testimony*

Disregarding the material uses the defense could have made of the *Brady* information, respondents base their arguments on their claim that the jury would necessarily have been apprised "that an eminent polygrapher entertained 'no doubt at all' that Bello was truthful when he identified the defendants as the murderers." (Pet. 8, 21) There are four answers to this assertion. First, Bello never identified *anyone*, let alone Carter and Artis, as the murderers (see discussion at Pet. App. 64a, regarding the State Supreme Court majority's misstatement of this and other significant facts). Second, the notion that polygraph results of Bello have any meaning is preposterous. Bello had an undisputed history of "passing" polygraphs, only to be discovered later to have been lying. And, the various Bello exams, marked by irreconcilable results (*e.g.* Harrelson: Bello in the bar; Arther: Bello on the street; see Pet. App. 130a-131a) also conclusively show that if there is any validity to polygraphy, Bello is not a fit subject to be tested.[17]

Third, petitioners ignore the District Court's solution (which they conceded at argument below, was a viable one), that the polygraph evidence would have been limited to purposes of credibility, avoiding the necessity of having even the results (let alone polygrapher's testimony) presented to the jury (Pet. App. 65a) Fourth, even if the results were admitted, it hardly follows that Harrelson's "beliefs" would have been. Petitioners, like the Supreme Court majority, casually blur the distinction between polygraph results and the polygrapher's groundless, unscientific conjecturing as to guilt or innocence of people he never tested.

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[17] Other factors adversely affecting the fitness of a subject for polygraphy also apply to Bello: serious head injuries; alcoholism, which Bello acknowledged impaired his memory (Bello had been drinking on the night of the crime); the

(Footnote Continued)

Even if all rules of evidence were suspended and Harrelson were permitted to speculate about the culpability and veracity of people he had not tested – that, as Harrelson stated at the hearing, he believed Carter and Artis were the murderers because Bello had told him that, while standing in the hedge, he saw Carter and Artis armed and backing out the front door of the Lafayette Bar[18] – then he would have looked ridiculous and been impeached by his own contemporaneous notes (A. 4E616-633), which show that Bello told him none of these things; yet Harrelson swore he based his opinion on these same notes, and that they were accurate (A. 2C437)! Nor would the reliability of his opinions have been enhanced if the jury were to learn that he concluded (in his written report) that Bello's 1967 testimony was true, even though he didn't have a clue as to what that testimony was.[19]

III. The Notice of Appeal Issue is Superfluous and Not Worthy of a Grant of Certiorari.

The petition's third question relates to the State's admitted failure to file a Notice of Appeal on the order granting the writ to co-respondent John Artis. Petitioners excuse themselves on the ground that they were in such a hurry to appeal the Carter writ (in order to block his release order) that they did not deal with the separate Artis order (Pet. 24-25). And they conceded below that they did

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length of delay between the event and the testing (10 years), etc. The other polygraph test petitioners refer to (Pet. 22) was meaningless for additional reasons. Bello was never asked if he was in or out of the bar, or if he saw any gunmen; nor was he asked anything about Artis, or the involvement of others. As such, his answers were consistent with his various previous stories.

[18] Aside from the rudimentary problem that there was no hedge outside the Lafayette Bar, this novel scenario, which surfaced for the first time at the remand hearing – five years after the test and the trial – is contrary to *all* of Bello's versions, including his trial testimony, wherein he claimed he saw respondents, not backing out of the bar, but strolling around the corner of the building outside on the street afterwards.

[19] A 41-minute phone call between prosecution and Harrelson in the time between his oral and written report would also have taken on greater significance, especially when tied to Harrelson's admissions to a reporter about prosecution efforts to change his opinion (A. 11C2567-2569), and by testimony showing his opinion was influenced also by false, racist remarks by the prosecution (A. 2C501-507); *e.g.*, that Carter had allegedly refused to be polygraphed by Harrelson because his skin was white. And his testimony would have been

(Footnote Continued)

not file a notice as to Artis because of the uncertainty of his status at that time (Pet. App. 9a). Petitioners also misstate the facts and are simply wrong in asserting (Pet. 28) that Artis' attorney was served with a notice of appeal at the November 8 hearing or at any time. (See February 10, 1986 letter and affidavit of Artis' attorney filed with the Court of Appeals. As the Exhibits were omitted from Petitioner's Appendix, they are reproduced here at Appendix A). Petitioners' claim that Artis abandoned the jurisdictional issue is also belied by counsel's Notice of Appearance which specifically preserved it (Pet. App. 213a).

This Court has granted certiorari in a case involving a related issue (not naming a specific appellant in a Notice of Appeal in a class action context) in *Torres v. Oakland Scavenger*, Dkt. No. 86-1845 (October 13, 1987). But there is no reason to hold this case for the decision in *Torres* and certainly no reason to grant certiorari in this case on that issue. Artis is in precisely the same position as Carter on the merits of the case. If certiorari is denied with respect to questions 1 and 2, then the the writs of habeas corpus must be granted in any event and the Notice of Appeal issue becomes moot and irrelevant. There is no basis for granting the writ or delaying action on the petition on the basis of the third question alone.

CONCLUSION

For the reasons stated above, the writ of certiorari should be denied.

Dated: New York, N.Y.
December 14, 1987

LEON FRIEDMAN
Hofstra Law School
Hempstead, N.Y. 11550
(212) 737-0400
Counsel of Record for Respondents

MYRON BELDOCK
BELDOCK, LEVINE & HOFFMAN
99 Park Ave.
New York, N.Y. 10016

LEWIS M. STEEL
STEEL, BELLMAN & LEVINE
351 Broadway
New York, N.Y. 10013

devastated by other polygraphers who would say that the scope of polygraphers' competence is extremely narrow (*i.e.*, is the subject intentionally lying, or not) (A. 4C883-884). See also Pet. App. 130a-131a.

APPENDIX

APPENDIX A

STEEL & BELLMAN, P.C.
Attorneys at Law
351 Broadway
New York, N.Y. 10013
(212) 925-7400

February 10, 1986

Ms. Sally Mrvos
Clerk
United States Court of Appeals
for the Third Circuit
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: John Artis v. Dietz, et al.
No. 85-5735

Dear Ms. Mrvos,

I am in receipt of the Reply of Respondents to the Motion of Petitioner-Appellee John Artis to Dismiss Appeal in the above matter. I write this letter in response to this Reply. I am also enclosing a short Affidavit, as the Response raises certain factual questions which should be answered.

Counsel for respondent attempts to justify the failure to include John Artis' name in the body of the Notice of Appeal and the failure to state that respondents were appealing from the District Court's separate grant of the petition as to Artis as well as the grant of the petition as to Carter and the order releasing Carter on the ground of excusable neglect. Respondents, however, cite no case law which would permit the making of such an argument, more than 60 days after the order to be appealed from was filed. Indeed, the case law, as set forth in my letter of January 22, 1986 is uniformly to the contrary.

Case law does exist, of course, wherein under certain circumstances notices of appeal from district court orders involving multiple

parties of multiple orders have been read liberally to allow a particular appeal against an additional party to go forward or to allow the appellate courts to consider multiple orders on appeal. There is, however, no basis upon which the Notice of Appeal in this case can be liberally construed to include an appeal against John Artis.

Respondents' counsel has admitted in his Affidavit to this Court that the Notice was drawn up by an attorney in the Prosecutor's office who omitted Artis from the body of the appeal because at the time he drew up the Notice of Appeal, he did not know whether the district court was going to immediately grant a writ as to Artis. Affidavit of John Goceljak, par. 14. Thus, the Prosecutor's Office did not intend to have the Notice of Appeal give Artis notice that respondents were appealing as to him. Moreover, a Notice of Appeal was never served upon counsel for Artis. See Affidavit of Lewis M. Steel, par. 2.

After the district court, with the consent of respondents' counsel, entered an order granting Artis' writ, respondents, if they wanted to appeal the Artis order, should have added the granting of Artis' writ to the body of the Notice of Appeal which the Prosecutor's Office had already prepared or prepared a second Notice of Appeal with regard to Artis. Having failed to take either of these actions, respondents should not be allowed to argue that the Notice of Appeal which they did file should be read in a manner which was inconsistent with their own intent at the time they prepared the Notice. Thus, this case is not governed by *Gooding v. Warner Lambert Co.*, 744 F.2d 354, 357 (fn.4) (3d Cir. 1984) where the Court pointed out that it was clear that the intent of the notice in question was to cover both a summary judgment order dismissing the action as well as a prior order dismissing a restitution claim.

Instead, this case comes squarely within the framework of *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977) wherein this Court stated:

> But in any case, the notice of appeal must conform to the requirement of Rule 3(c), F.R.App.P. that it "shall designate the judgment, order or part thereof appealed

> from." When an appeal is taken from a specified judgment only or from a part of a specified judgment, the court of appeals acquires thereby no jurisdiction to review other judgments or portions thereof not so specified, or otherwise fairly to be inferred from the notice as intended to be presented for review on the appeal.

Elfman Motors, Inc., like this case, involved multiple parties. There, as here, a notice of appeal was filed which stated that the appeal was from district court orders with regard to certain of the defendants. The notice in *Elfman* did not mention another court order which granted summary judgment to two of the other parties. Moreover, in *Elfman*, as in this case, the notice of appeal was not served on counsel for these additional parties.

Under all these circumstances, the Notice of Appeal in this case should not be read to include Artis. A ruling which would include Artis in this appeal, in effect would totally vitiate the requirement of Rule 3 in multiple party cases, and would mean that virtually any appeal against one prevailing party should be read as an appeal against all parties, no matter what the notice states.

A copy of this letter has been sent to counsel for respondents, as well as counsel for Carter, and an affidavit of service is also enclosed.

Respectfully submitted,

s/ Lewis M. Steel
Lewis M. Steel

LMS:PC
Enclosures:
Letter, original and three copies
Affidavit and Affidavit of Service
cc. Joseph Falcone, Esq.
Attn: John P. Goceljak, Esq.
Myron Beldock, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN ARTIS, No. 85-5735

AFFIDAVIT

Petitioner-Appellee,

—against—

CHRISTOPHER DIETZ, et al.,

Respondents-Appellants

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

LEWIS M. STEEL, being duly sworn, deposes and says:

1. I am the attorney for John Artis and submit this Affidavit in response to the Affidavit of respondents' counsel, John P. Goceljak, dated February 4, 1986.

2. Mr. Goceljak, in par. 17 of his Affidavit, states that after the district court completed the proceedings on November 8, 1985, "counsel for respondents provided conformed copies of the already filed Notice of Appeal [the only Notice of Appeal filed in this case] to counsel representing petitioners at their counsel table." I represented petitioner Artis at the November 8, 1985 hearing. At the conclusion of the hearing, I moved away from the petitioners' counsel table in order to express my congratulations to petitioner Carter and to shake the hands of many friends in the courtroom.

At no time on November 8, 1985 was I served with a copy of respondents' Notice of Appeal, nor did respondents serve me with the Notice at any time thereafter.

/s Lewis M. Steel
Lewis M. Steel

Sworn to before me this
10th day of February, 1986

/s Richard F. Bellman
Richard F. Bellman
Notary Public, State of New York
No. 31-4607158
Qualified in New York County
Commission Expires March 30, 1987